(1D)

No. 02-182-ATX Title: Georgia, Appellant
v.
John Ashcroft, Attorney General, et al.

Docketed: August 6, 2002 Court: United States District Court for the District of Columbia

Entry	Date	Proceedings and Orders
	Jul 31 2002	Statement as to jurisdiction filed. (Response due October 21, 2002)
	Jul 31 2002	Supplemental Appendix of appellant filed.
	Aug 21 2002	Order extending time to file response to jurisdictional statement until October 7, 2002.
	Aug 21 2002	This extension is granted for all appellees.
	Aug 27 2002	Request to vacate extension of time granted by Clerk on August 21, 2002, filed.
	Aug 28 2002	Request to vacate extension of time granted by Clerk on August 21, 2002, denied by Chief Justice.
	Oct 7 2002	Order further extending time to file response to jurisdictional statement until October 21, 2002.
	Oct 7 2002	This extension is granted for all appellees
	Oct 21 2002	Motion of appellees Intervenor-Appellees Patrick Jones, et al. to dismiss or affirm filed.
	Oct 23 2002	Motion of appellees John Ashcroft, Attorney General, et al. to affirm filed.
	Nov 6 2002	DISTRIBUTED for Conference of November 27, 2002
	Dec 2 2002	REDISTRIBUTED for Conference of December 6, 2002
	Dec 9 2002	REDISTRIBUTED for Conference of December 13, 2002
	Jan 6 2003	REDISTRIBUTED for Conference of January 10, 2003
	Jan 13 2003	REDISTRIBUTED for Conference of January 17, 2003
	Jan 17 2003	PROBABLE JURISDICTION NOTED. The brief of appellant is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, March 3, 2003. The brief of appellees is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, April 2, 2003. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, April 21, 2003. Rule 29.2 does not apply. SET FOR ARGUMENT April 29, 2003. **********
	Feb 22 2003	Brief of appellant Georgia filed.
	Feb 28 2003	Letter from Governor Perdue of Georgia received and distributed.
	Mar 3 2003	Letter of Attorney General Baker in response to Perdue letter received and distributed.
	Mar 4 2003	Letter response from Governor Perdue received and distributed.
	Mar 5 2003	Letter of Attorney General Baker received and distributed
	Mar 7 2003	CIRCULATED.
	Mar 20 2003	Letter from counsel for Governor Sonny Perdue in response received and distributed.
	Apr 1 2003	Brief amicus curiae of Georgia Coalition for the Peoples'

No. 02-182-ATX

Entry	Date	Proceedings and Orders
		Agenda filed.
	Apr 2 2003	Brief of appellees John Ashcroft, et al. filed.
	Apr 2 2003	Brief of appellees Intervenor-Appellees, Jones, Tyra, Benton, and Steele filed.
	Apr 7 2003	Motion of the Solicitor General for divided argument filed.
	Apr 14 2003	Record filed.
	Apr 18 2003	Motion of the Solicitor General for divided argument GRANTED.
	Apr 18 2003	Reply brief of appellant Georgia filed.
	Apr 29 2003	ARGUED.

Supreme Court, U.S.
FILED

(1)

No. 02 182 JUL 31 2002

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

THE STATE OF GEORGIA,
Appellant,

v.

JOHN ASHCROFT, *et al.*,
Appellees,

and

PATRICK L. JONES, *et al.*
Intervenors.

On Appeal from the United States District Court
District of Columbia

JURISDICTIONAL STATEMENT

THURBERT E. BAKER
Attorney General of the State of Georgia

DENNIS R. DUNN
Deputy Attorney General

MARK H. COHEN
Troutman Sanders LLP

THOMAS SAMPSON, SR.
Thomas, Kennedy, Sampson & Patterson

* Counsel of Record

DAVID F. WALBERT *
PARKS, CHESIN, WALBERT & MILLER, P.C.
26th Floor, 75 Fourteenth Street
Atlanta, Georgia 30309
(404) 873-8000

Counsel for Appellant

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTIONS PRESENTED

I. Whether Section 5 of the Voting Rights Act Requires the Drawing of Safe Majority-Minority Districts with Supermajority Minority Populations, Rather than Districts that Afford Minorities Equal Opportunities at Success?

II. Whether Section 5 can be Constitutionally Construed to Require the Drawing of Supermajority Minority Legislative Districts in Order to Create Safe Seats, Rather than Seats that Afford Minorities Equal Opportunities at Success?

III. Whether Private Parties Should be Allowed to Intervene in a Section 5 Preclearance Action and Assume the Role and Authority of the Attorney General?

PARTIES

All parties to the proceeding below are:

State of Georgia

John Ashcroft, in his official capacity as Attorney General of the United States

Ralph F. Boyd, Jr., U.S. Assistant Attorney General, in his official capacity

United State of America

Della Steele
Georgia Benton
Patrick L. Jones
Roielle L. Tyra

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JOHN ASHCROFT, *et al.*,
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and

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Intervenors.

On Appeal from the United States District Court
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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The orders of the three-judge panel of the United States District Court for the District of Columbia are reported at 204 F.Supp.2d 4 (D.D.C. 2002) and 195 F.Supp.2d 25 (D.D.C. 2002), and are reproduced at J.S.1a and 23a.

JURISDICTION

This is an appeal from the order of a three-judge court denying a declaratory judgment to preclear Georgia's Senate Redistricting Plan under § 5 of the Voting Rights Act. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1253 and 42 U.S.C. § 1973c.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This appeal also involves §§ 2 and 5 of the Voting Rights Act of 1965, 42 U.S.C. §§ 1973 and 1973c. The text of these statutes is set forth at J.S. 220a and 221a.

STATEMENT OF THE CASE

THE REDISTRICTING PLANS AT ISSUE: At two special sessions in 2001, the Georgia General Assembly redrew State House, Senate, and congressional districts in light of the 2000 census. All three plans either maintained or increased the number of majority black districts. For the House plan, the number of majority BPOP (black population) districts increased from 40 to 42; and majority BVAP (black voting age population) districts increased from 37 to 39. For the Senate plan, the number of majority BPOP districts remained at 13; the number of majority BVAP districts increased from 12 to 13. For Congress, the number of majority BPOP districts remained at 2; the number of majority BVAP districts increased from 1 to 2.[1] (P.Exs. 1D, 2C, 8D, 9C, 11D, 12C). The high percentages of African Americans in the majority BPOP/BVAP districts were generally lower under the new plans, however, as discussed below.

[1] The 2000 Census is the first census that allowed multiple race responses. Consistent with the Census Bureau, Georgia counted as "black" all persons who responded either as "black only" or as black in combination with any other race. Inexplicably, the DOJ contended at one point that it might be appropriate to count, as "blacks," those multiple-race responders who responded both black and white, but not persons who responded as black and any other race. (J.S.40a). In some instances, the minuscule change in BVAP under the DOJ's alternative method could change the count of the number of majority districts. The evidence is undisputed that Georgia's methodology is correct. To avoid any possible confusion over this issue, the State introduced the testimony of Dr. Roderick Harrison, the former Chief of the Racial Statistics Branch of the U.S. Census Bureau. His uncontradicted testimony established that the State's methodology is appropriate. (P.Ex. 26).

TRIAL COURT PROCEEDINGS: This action was filed on October 10, 2001, seeking § 5 preclearance for each of the new redistricting plans. In light of the extensive experience of Georgia and its subdivisions with protracted administrative proceedings under § 5 and the need for a definitive decision at the earliest practicable date, Georgia exercised its statutory right to proceed directly to the District of Columbia District Court.

By order of December 19, 2001, the court directed the Department of Justice (DOJ) to identify what plans and specific districts, if any, it challenged. The DOJ responded by taking no issue with the congressional plan, and, after a requested extension of time, taking no issue with the House plan either. The DOJ did oppose the Senate plan, complaining about Senate Districts ("S.D.") 2, 12, and 26.

A motion to intervene was filed on behalf of several African American voters, who were represented by the general counsel to the Georgia Republican Party. On January 10, 2002, the court denied intervention as to the congressional plan because the DOJ did not object to that plan: "[T]his court will not 'accommodate the intervenors' quest for a forum in which to test a voting plan' which the United States does not contend violates the Voting Rights Act." (J.S. 217a). Intervention as to the Senate plan was allowed because that plan was challenged by the DOJ. Intervention as to the House plan was left open, pending the DOJ's final position on that plan. (J.S. 218a, n.2). By order of January 29, 2002, the court reversed its position and allowed intervention as to all plans, regardless of the DOJ's position. (J.S. 214a). Intervenors thus had the plenary right to contest all aspects of all three plans at trial, but they failed to overcome the State's proof on any issue.

The court required that direct testimony of all lay witnesses be presented in advance of trial through transcript or, as the DOJ did, by affidavits prepared by counsel. Cross-

examination was done by pretrial deposition. Expert reports were introduced. The only live testimony at trial was expert cross-examination. Trial occurred February 4-7, 2002, before one judge, Hon. Emmet Sullivan. Closing argument occurred February 26, 2002, before all three judges.

THE COURT'S RULING: In a 2-1 decision on April 4, 2002, the court precleared Georgia's congressional and House plans, but rejected the Senate plan based on the DOJ's criticisms of the three districts objected to. (J.S.142a-47a). The disagreement between Judges Sullivan and Edwards in the majority, and Judge Oberdorfer in dissent, boiled down to a concise legal question: Does § 5 require the drawing of safe minority districts, or is the State allowed to draw districts where minorities have "merely" equal opportunities at success? The majority held that the State must maintain, as *safe*, any district that previously had a supermajority minority population, even if the district was greatly underpopulated and had to be expanded to comply with one-person/one vote requirements. As Judge Sullivan wrote:

> [I]f existing opportunities of minority voters to exercise their franchise are robust, a proposed plan that leaves these voters with merely a "reasonable" or "fair" chance of electing a candidate of choice may constitute retrogression in overall minority voting strength. (J.S.113a).

Judge Sullivan's majority opinion rejected Georgia's contention that an otherwise non-discriminatory plan should receive § 5 preclearance, even if a supermajority, safe seat is redrawn as a seat where minorities have an equal opportunity, but are not guaranteed to win.

> Georgia contends that because its plan preserves for black voters a reasonable—or equal—chance to elect candidates of choice in the three districts at issue, the State has satisfied § 5. . . . The State's implicit argument

> is that retrogression cannot exist where its proposed plan satisfies § 2. We disagree. (J.S.112a).

In so holding, the court acknowledged that none of the plans were motivated by a discriminatory or "retrogressive" purpose. (J.S.147a-49a).

Judge Edwards, joined by Judge Sullivan, wrote in concurrence:

> Our dissenting colleague argues that § 5 is satisfied whenever a covered jurisdiction adopts a plan that preserves an "equal or fair opportunity" for minorities to elect candidates of their choice. This is not an accurate statement of the law. (J.S.151a).
>
> . . . .
>
> When the idea of *retrogression* is taken seriously, as the dissent refuses to do, it is quite obvious that a proposed plan backslides from an existing plan if it *merely* affords the protected class an equal opportunity to elect a fixed number of candidates and the existing plan affords the protected group a significantly better than equal chance of electing that same slate of candidates. Accordingly, all other things being equal, a state that converts a safe district into one where African Americans have only a "fair opportunity" would be hard pressed to preclear its plan under the § 5 analysis described by the Supreme Court. (J.S.152a; emphasis partly added).

Judge Edwards further wrote that "neither the Supreme Court nor any other court, has held—or even hinted—that preclearance under § 5 must be granted to a plan that protects equal electoral opportunities for minority voters." *Id.* 153a. According to Judge Edwards, Judge Oberdorfer's contrary conclusion was a "legal error infect[ing] the whole of the dissent's analysis." *Id.* At closing argument, Judge Edwards

expressed his consternation with this Court's voting rights jurisprudence:

> The problem is, as you well know, the status quo analytically makes no sense when we have demographics that are changing, or you have one person one vote. It is a bogus—I mean unfortunately the [Supreme] court does not make it easy for us in some of these cases. To say, let's look at the status quo, is kind of dumb, when you cannot look to the status quo because by definition it is impermissible. (Tr. 128-29, 2/26/02).

Judge Oberdorfer dissented as follows:

> Neither the text of § 5 nor authoritative decisions interpreting it require the preservation of super or "robust" majorities that would guarantee election of the minority candidate of choice; the statute and precedents "merely mandate that the minority's *opportunity* to elect representatives of its choice not be diminished, directly or indirectly, by the State's actions. *Bush v. Vera*, 517 U.S. 952, 983 (1996). (J.S.187a; emphasis in original).
>
> . . . .
>
> It is my view that § 5 does not prevent a state from adopting a redistricting plan, with the blessing of African-American legislators, that reduces "packed" concentrations of black voters so long as it preserves equal or fair opportunities for minorities to elect candidates of choice. It may well be that super-majorities of black voters under the benchmark plan create "robust" opportunities to elect a candidate of choice. But under the law of unintended consequences, they may also create conditions that are "unfair," "unreasonable," and "unequal," to both minority voters in those districts whose votes are "wasted," to the point that they may find it unnecessary to turn out and vote, and to non-minority voters in those districts whose voting interests might well be "submerged" by the super-majority to the

> point that they turn away from the political process. The Voting Right Act does not countenance, let alone require, such a result.
>
> The Constitution and the Voting Rights Act do not guarantee victory to minority candidates, but only equal opportunity.(J.S.206a-07a; citation omitted).
>
> . . . .
>
> There is "no vested right of a minority group to a majority of a particular magnitude unrelated to the provision of a reasonable opportunity to elect a representative." (J.S.207a; citation omitted).

THE AMENDED SENATE PLAN AND SUBSEQUENT PROCEEDINGS: With the district court's ruling, Georgia was left with no enforceable plan for the 2002 elections. The district court agreed to retain jurisdiction and allowed the State 20 days to enact and submit a revised Senate plan. (J.S.2a). The General Assembly immediately passed a plan that raised the BVAPs in S.D. 2, 12 and 26. This plan included all of the black majority areas that were contiguous to the three districts, and excluded white areas the DOJ had objected to. (J.S.6a, 17a-18a, 20a). The BVAPs and BPOPs in the revised plan were thus increased substantially (J.S.5a):

	BPOP%		BVAP%	
S.D.	2001 Plan	Rev'd Plan	2001 Plan	Rev'd Plan
2	55.60	59.47	50.31	54.50
12	54.01	58.66	50.66	55.04
26	55.36	60.32	50.80	55.45

The DOJ did not object to the amended plan, and the district court approved it over intervenors' continued objections.

The amended Senate plan is an interim remedy that, by the express terms of the statute, will lapse upon the original plan receiving § 5 preclearance. (Ga. Laws of 2002, Act No. 444, § 1(b); J.S. 223a). Thus, there remains an active case or

controversy regarding the original Senate plan that the district court rejected. The case is in no way mooted by the fact that a temporary plan was enacted.

GEORGIA'S RECENT REAPPORTIONMENT HISTORY: Georgia's current legislative redistricting can only be understood by looking at the preceding redistricting of 1991-1992, which was dominated by the DOJ's policy of requiring racially gerrymandered, "max-black" districts. What occurred in Georgia is detailed in the opinions of this Court and the lower courts. *See Miller v. Johnson*, 515 U.S. 900 (1995); *Abrams v. Johnson*, 521 U.S. 74 (1997); *Johnson v. Miller*, 929 F.Supp. 1529 (S.D. Ga. 1996) (*Johnson III*). Georgia's congressional redistricting was dictated by a "max-black" plan originally drafted by the ACLU. 515 U.S. at 907-08. Because that reapportionment was predominantly based on race and there was no compelling reason to justify the supermajority minority districts the DOJ required, the plan was unconstitutional. *Miller v. Johnson, supra*. A remedial plan was imposed by the trial court for future congressional elections. *Abrams, supra*.

The Georgia House and Senate redistricting in 1991-1992 followed the exact same course in the General Assembly. Racially gerrymandered House districts had been building blocks for the Senate Districts, all of which, in turn, were used as the building blocks for the congressional districts. *Johnson III*. The DOJ had required, as a condition of preclearance, that State House and Senate districts be drawn to include "available" minority populations in the area, just as had been demanded in congressional redistricting. 929 F.Supp. at 1540. As a result, Georgia's House and Senate districts were almost exclusively of two kinds: Those with very high, supermajority black populations; and those with much lower minority populations (sometimes referred to as "bleached" districts). There were virtually no districts with BPOPs or BVAPs (black population and voting age population, respectively) in the 40-50% range.

After this Court's *Miller* decision in 1995, the Georgia General Assembly held a special session and adopted new House and Senate plans. 929 F.Supp. at 1540. These plans unwound part of the DOJ-demanded racial gerrymander of 1991-1992, but by no means all. In spite of the *Miller* decision, the DOJ still denied preclearance to the modified House and Senate plans in 1996 and then sued the State in an effort to compel use of the old, patently illegal plans. *Id.* 1541. The district court in *Johnson III* enjoined use of the 1991-1992 House and Senate lines and imposed an interim remedy for the 1996 elections. Commenting on the particular districts challenged by the *Johnson III* plaintiffs, the district court found that "the record is replete with direct and circumstantial evidence that race was the predominant factor in drawing the sixteen districts we have determined to be unconstitutional." *Id.* at 1544.

> In attempting to maximize the number of majority black districts, the DOJ dictated the number and location of these districts in its objection letters. Because there were not enough existing concentrations of black voters to allow the creation of the desired number of black districts in a manner consistent with traditional districting principles, the DOJ used computer-generated maps to ascertain where black populations were concentrated. It then required the drawing of lines, using land bridges when necessary to commandeer the necessary number of blacks into a district. *Id.* 1544-45.

Under the direction of the court, the State and DOJ reached a mediated agreement on plans for future House and Senate elections. Those plans were adopted by the General Assembly in 1997, and precleared by the DOJ pursuant to the settlement agreement. (Pl.Stip. ¶¶ 108-111). Georgia was thus left with much of the redistricting residue of the DOJ's maximization strategy from 1991-1992 as it approached redistricting in 2001. The re-drawn House and Senate plans

were very similar to those originally passed by the General Assembly in 1991-92; only the clearly unconstitutional parts were modified.

One consequence of this redistricting history is that Georgia's House and Senate districts throughout the 1990's consisted almost entirely of districts either with (1) very high BVAPs, or (2) much lower BVAPs. Midrange districts were rare.

REAPPORTIONMENT IN 2001: Maintaining Georgia's majority minority districts in the 2001 reapportionment was very challenging, as problems of population growth left most minority districts far short of one-person, one-vote requirements. Thirty-two of the 37 majority BVAP House districts ranged from 7% to 32% short of population. (P.Exs. 11C, 12C). Seven of the 10 majority BVAP Senate districts were from 14% to 27% short of population, according to the 2000 census. (P.Ex. 1D and 1E). Because of changing housing patterns, the majority-minority districts also had become much blacker since the 1990 census. Many House and Senate districts had BVAPs of 60% and above. (P.Exs. 1D, 11D).

African Americans had a full voice in Georgia's 2001 redistricting. There were 34 African American representatives in the House out of 180 members, and 11 out of 56 Senators. (Stip. ¶ 11). Six of the 29 House Reapportionment Committee members were black, and six of the 24 Senate Reapportionment Committee members were black. (J.S.43a). The vice chairman of the Senate Committee, Robert Brown, was black, and he chaired the very subcommittee that developed the Senate plan. (*Id.*; Tr.23, P.Ex.22). Among black legislators, the nearly universal consensus was "to maintain [their] districts, but not . . . waste their votes." (Tr. 20-21, P.Ex. 22). Because the "high black percentages" were a "waste of their votes," minority legislators supported substantial BVAP reductions in the existing supermajority

districts. *Id.* 21. It is undisputed that redistricting plans could not have passed the General Assembly without substantial minority support.[2] As Senator Brown testified:

> I think the [50%] BVAP levels in the [Senate] plan give good opportunities for African American candidates. And I can tell you this. The nearly unanimous consensus from the Black Caucus in the Senate that voted for the plan would never have been there had that not been a belief shared by those senators. (Tr. 29-30, P.Ex. 20).

The effort to preserve minority districts without squandering minority influence in safe supermajority districts led to the enactment of a number of legislative districts with BVAPs of 50% or slightly above. It was the overwhelming opinion of minority legislators that such districts afforded African American candidates fair opportunities to win. Senator Brown testified that these districts afforded minority candidates a "very good chance of success":

> Q. [W]ould you share your opinions with the Court concerning the ability of African American candidates to get elected in these several districts which have a BVAP of just a bit over 50%, as they were finally passed in the Senate Plan last year?
>
> A. Sure. I feel comfortable that, with a good candidate, there is a very good chance that an African American would be elected. And I think today, much more than what was true not so many years ago, there is a good farm team, I've called it that before, of African American elected officials in other positions that

[2] In the Senate, only one African American Senator (S.D. 2) voted against the Senate plan (J.S. 56a), and she did so simply because of her personal desire for a district exactly as she wanted it—which ignored the fact that 56 Senate districts had to be drawn with no one incumbent getting just what they wanted. One African American House member also voted against the House plan. (J.S. 56a, 134a). Such near unanimous support is a rarity in any political endeavor.

> could move up in the event of a vacancy. I think the incumbents in these districts at these BVAP levels are in very solid shape. But speaking specifically to the question of an open-seat, I think that an African American candidate would have a good chance of winning. He or she would have to have a good organization and work hard, but there's no reason why an African American can't win at a 50% BVAP. (Tr.29-30,P.Ex.20).

The Senate majority leader, Charles Walker, is an African American. He testified to the same effect, that an African American candidate would have a "fair or equal opportunity" to win with a BVAP of "forty percent and above," and he was "comfortable at a 45% BVAP level." (P.Ex.24, pp.11-12). Georgia Congressman John Lewis also testified. He is as knowledgeable about electoral experiences in Georgia as anyone alive. Congressman Lewis testified as follows:

> I think a candidate, a good solid black candidate, would have more than a 50 percent chance of winning with a 50 percent BVAP in Georgia. Whether a black candidate wins or not in a district with that level of BVAP will depend more on the specifics of the particular candidate and his or her campaign. The kinds of things that are important in any campaign, like hard work, putting together a good organization, and so on, will make a difference. But a credible black candidate certainly has a good chance of winning a legislative seat anywhere in the State, I think with a 50% BVAP.
>
> The state is not the same state it was. It's not the same state that it was in 1965 or in 1975, or even in 1980 or 1990. We have changed. We've come a great distance.(Tr.17-18, P.Ex.21).

In contrast to this compelling testimony, the DOJ offered the testimony of various people who lived around S.D. 2, 12, and 26. Their "direct testimony" consisted entirely of affidavits drafted by the DOJ. Generally, these affidavits opined as to: (1) the difficulty of an African American winning in

new S.D. 2, 12, and 26; and (2) the existence of "racial vote polarization." On deposition cross-examination, these witnesses almost entirely contradicted their affidavits. For example, Clifton Jones acknowledged that "blacks still have a fair opportunity to elect the candidate of their choice" in the proposed S.D. 2. (C.Jones Dep.63). Charles Sherrod admitted that a number of black candidates had won with substantial white vote. Sherrod ascribed whites voting for blacks to "a phenomenon down here in south Georgia that we can't explain sometimes. It occurs when white people want to do their thing and they do it." (Sherrod Dep.97). DOJ witness Albert Abrams had, himself, won election in one of the most populous Georgia counties where the BVAP was 43%. (Abrams Dep. 22-23). William Barnes admitted that a black candidate had a reasonable chance of winning in a 50% BVAP district. (Barnes Dep.59). Several witnesses acknowledged that any number of African American candidates could win the proposed 50% BVAP districts. (*E.g.*, Hart Dep. 44-45; Abrams Dep.34-35,45,61).

The pervasive admissions by the DOJ's witnesses on cross-examination that contradicted their conclusory affidavits are set forth in Georgia's Proposed Post-Trial Findings of Fact. (PPFF pp. 108-15, 157-71, 178-92, 198-206). Judge Oberdorfer characterized the lay testimony as follows:

> I have also considered the testimony of the Department's lay witnesses, although I believe it pales in importance to the testimony of Lewis, Brown, and Walker and the expert witnesses. To the extent that discrepancies exist between declarations and depositions of the Department's lay witnesses, I accept the latter as more credible, because it represents the witnesses' own words, rather than the adoption of statements at least partially prepared by the counsel. The deposition testimony is also more comprehensive, and permits the witnesses to explain and elaborate on statements contained in the declarations. (J.S. 210a).

GEORGIA'S ELECTION EXPERIENCE 1991-2001: Georgia's election experience plainly demonstrates that the high BVAPs required by the district court create unnecessarily safe districts. Minority candidate success in Georgia the past decade has been compelling. Georgia's statewide BVAP is 26.6%, and eight of the State's 32 offices that are elected statewide are held by African Americans.[3] (P.Ex.25,p.3).

The undisputed evidence at trial included a database that contained *all* 1,258 legislative elections (State House, Senate, and Congress) that occurred from 1991 through 2001. This comprehensive data includes the BVAP of the district at the time of election; whether an African-American candidate won; whether there was an incumbent in the race; etc. (P.Ex.25, Att.2). This uncontradicted data revealed that African American incumbents have an effective guarantee of re-election in districts with BVAP levels far below 50%. There were exactly 200 such legislative elections since 1991, and the black incumbents won 199. (J.S. 225a) The only exception occurred where the incumbent was under a federal indictment. (P.Ex.25, p.16). In 18 of these elections, the BVAP ranged from 35 to 50%. *Id.*

Looking at open seat races, the African American candidate of choice won *every* election where the BVAP was 54% or higher. There were 30 such elections over the past 11 years. (J.S. 238a) There were six open seat legislative elections in the 11 year period where the BVAP ranged from 33% to 39.9%. *The African American candidate won two of those six elections. Id.* Because of the past gerrymanders, there was only one open seat election over the 11 years that fell in the 40% to 49% range. There were four open seat

[3] Five of those positions are elected judgeships; all five African American judges have won reelection. Of the other three statewide offices held by African Americans, two were initially appointed to vacancies (just as has occurred for whites) and then won reelection; the third won an open seat in 1998. (P.Ex.25,p.3)

elections between 50% BVAP and 53.5% BVAP where the candidate of choice could be determined, and African Americans won two out of those four.

The Senate election history over the last 11 years is equally consistent with the fact that a BVAP of 50% or more affords an excellent opportunity for an African American candidate of choice to prevail. Defendants argued that no present incumbent African American Senator was elected in an open seat election with a BVAP of less than 53.5%. That contention is totally disingenuous. It ignores the fact that—because of the DOJ orchestrated reapportionment of 1991-92—there were virtually no Senate seats between 40-50% BVAP throughout the entire decade. As a result of the DOJ's actions, there were only three Senate districts that ever had a BVAP level between 40% and 49%, at any time, during the 1990's and up through 2001. The absence of black candidates winning more frequently in this range is not a reflection of their inability to do so, but the paucity of such districts resulting from the DOJ's action under § 5. (J.S. 242a)

Furthermore, the experience in the three Senate districts that did fall in the 40-49% range utterly belies the DOJ's contention. Of these three Senate districts, one was won and held by an African American candidate who beat a white incumbent when the BVAP was 41% (S.D. 25, in 1994). *Id.* The BVAP was then lowered in 1996, after the *Miller* decision, to 36.66%. The black incumbent won re-election. Neither he nor any other minority candidate ran for re-election or election in that district thereafter. *Id.*

The other two Senate districts that ever fell in the 40-49% range were S.D. 14 and S.D. 44. S.D. 14 had a white incumbent in each of the three elections when its BVAP exceeded 40%. S.D. 44 was a rapidly transitional district. Its BVAP changed from 40.39% to 49% between 1996 to 2000. In each of those elections, the white incumbent ran and won. *Id.*

Defendants have made much of the fact that there were no open seat black winners in *Senate* districts in the 40-50% range from 1991-2001. Again, the contention is specious. There were *no* open seat Senate elections in that BVAP range from 1991-2001 *because of the DOJ's past gerrymandering of Georgia's lines*. (J.S. 238a; 242a).

THE PARTIES' EXPERT TESTIMONY: Expert opinion testimony was presented by all parties. Dr. David Epstein of Columbia University performed a probit analysis (a standard probability methodology) on all of Georgia's legislative elections from 1991 through 2001. He determined from that comprehensive data that African American candidates of choice had an equal chance of winning an open-seat election where the BVAP was 45%, and an increasingly higher likelihood with greater BVAPs.[4] Dr. Epstein determined at the outset that a unified probit analysis was appropriate for the State as a whole because the degree of variability in racial voting patterns permitted that approach. (Tr.68-69, 2/4/02, Aft. Sess). The DOJ's expert, Dr. Richard Engstrom, made no assessment at all as to the likelihood of minority-preferred candidates winning an election as a function of BVAP. (Tr.10,14, 2/5/02, Aft.Sess.) Neither did he offer any opinion as to whether there was or was not retrogression under any of the plans at issue. *Id.* 70. Dr. Engstrom did, however, explain that he looked at "reaggregated" election returns in proposed S.D. 2, 12, and 26 using elections in which African American candidates had run. He admitted that this was the only method that he has used over the years to assess the "viability" of a district for a minority candidate. *Id.* Based

[4] Dr. Epstein's analysis used more conservative assumptions regarding race and politics than is permitted by this Court's decisions. He did not count a winner of an election as a minority "candidate of choice" where the BVAP was below 50%, unless the candidate was African American. Using this very conservative approach, he was especially confident that his results did not overstate the ability of African American voters to elect candidates. (P.Ex.25, pp. 10-13).

on that reaggregation analysis in this case, Dr. Engstrom admitted that Georgia's proposed S.D. 2, 12, and 26 afforded minority candidates a "very good chance" to win. *Id.* 88-89.

Dr. Engstrom performed certain "racially polarized voting" calculations on various elections, very few of which were coextensive with the legislative districts at issue. *Id.* 19, 85, 93-98. Based on the idea that there was "racial polarization" whenever 50.01% or more of minority voters preferred a different candidate than 50.01% or more of white voters, Dr. Engstrom found "polarization" in the local elections the DOJ attorneys had provided him to analyze. *Id.* 25. But Dr. Engstrom's analysis completely ignored the impact of the degree of polarization he found on the ability of minority preferred candidates to actually win. Incredibly, while Dr. Engstrom testified that there was racial polarization in most elections he reviewed, the fact is that African Americans won many of those elections, and won them in districts with much lower BVAPs than the proposed S.D. 2, 12, and 26. *Id.* 80-82. For example, Dr. Engstrom testified there was "polarization" in every state-wide election he examined, yet each of those elections, except one, was won by the African American candidate with a state-wide BVAP of only 26.6%. (*Id.* 85-86; P.Ex.25, pp.3-4). *Dr. Engstrom admitted that whether the minority candidate won or lost was irrelevant to him.* (Tr.85-86, 2/5/02, Aft.Sess.)

Intervenors' expert, Dr. Jonathan Katz, gave no opinions on the evidence; his sole role was to criticize Plaintiff's expert's use of probit analysis. On cross-examination, however, Dr. Katz admitted that he had used the same probit methodology himself in testimony he had given in another case where that analysis served his purpose. (Tr.47-58,61, 2/6/02, Aft.Sess.; P.Ex.107).

SUBSTANTIALITY OF THE QUESTIONS PRESENTED

I. SECTION 5 OF THE VOTING RIGHTS ACT DOES NOT REQUIRE THE DRAWING OF SAFE MINORITY DISTRICTS WITH SUPER-MAJORITY MINORITY POPULATIONS.

As this Court has noted on several occasions, § 5 represents a serious invasion of the most fundamental prerogatives of the states. It was originally enacted to complement the principal provision of the 1965 Voting Rights Act, which was the suspension of literacy tests. Congress included § 5 in the Act to ensure that no new changes in the laws of covered jurisdictions would be implemented that would undercut the voter registration gains achieved by the literacy test ban. *South Carolina v. Katzenbach*, 383 U.S. 301 (1966). The Act was initially passed in 1965 as a "temporary" measure to last five years. It has been extended three times, the last time in 1982 for another 25 years.

Because § 5 is such a procedural intrusion into the normal authority of the states, its substantive range is limited. The underlying purpose of § 5 was explained in *Beer v. United States*, 425 U.S. 130, 140-41 (1976):

> By prohibiting the enforcement of a voting-procedure change until it has been demonstrated to the United States Department of Justice or to a three-judge federal court that the change does not have a discriminatory effect, Congress desired to prevent States from "undo-[ing] or "defeat[ing] the rights recently won" by Negroes. H.R. Rep. No. 91-397, p. 8. Section 5 was intended "to insure that [the gains thus far achieved in minority political participation] shall not be destroyed through new [discriminatory] procedures and techniques." S. Rep. No. 94-295, p. 19.

The limited role of § 5 was addressed again in the *Bossier Parrish* cases. In *Bossier Parrish I*, this Court held that a

proposed voting change could have an impermissible "effect" only if it led to "a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Reno v. Bossier Parrish School Board*, 520 U.S. 471, 478 (1997). The DOJ's effort to minimize *Bossier Parrish I* by expansively interpreting the "purpose" term in § 5 was rejected in *Bossier Parrish II*, which held that § 5 "does not prohibit preclearance of a redistricting plan enacted with a discriminatory but nonretrogressive purpose." *Reno v. Bossier Parrish School Board*, 528 U.S. 320, 341 (2000).

In contrast to the limited *substantive* role of § 5, the later-enacted § 2 of the Voting Rights Act prohibits certain conduct, whether "retrogressive" or not. *Thornburg v. Gingles*, 478 U.S. 30 (1986); *Holder v. Hall*, 512 U.S. 874(1994). Under § 2, however, this Court has unambiguously held that legislative districts that provide minorities with *equal opportunities* are sufficient. There is no right to a guaranteed, safe, or "robust" seat. *Johnson v. DeGrandy*, 512 U.S. 997 (1994). While the members of the Court have not been unanimous in their interpretations of § 2, *see Holder, supra*, there is unanimous agreement that § 2 does not require maximization of minority voting strength. As Justice Souter wrote for the Court in *Johnson*:

> [T]he ultimate right of § 2 is equality of opportunity, not a guarantee of electoral success for minority-preferred candidates of whatever race. 512 U.S. at 1014, n.11.

The Court went on in *Johnson* to say the following about supermajority districts and *equal* political opportunity:

> [M]inority voters are not immune from the obligation to pull, haul, and trade to find common political ground, the virtue of which is not to be slighted in applying a statute meant to hasten the waning of racism in American politics. *Id.* at 1020.

This Court's jurisprudence, the statute itself, and all of the underlying congressional history make it clear that it is *equal* opportunity—not safe seats or guarantees—that is the object of the law. Section 2 districting claims require, as an essential element of proof, that the voting majority "must *usually* be able to defeat candidates supported by a politically cohesive, geographically insular minority group." *Thornburg v. Gingles*, 478 U.S. 38, 49 (1986). This § 2 requirement would be stood on its head under the district court's logic. The majority would convert the statutory proof requirement that minorities be "usually defeated," into a mandate that states enact districts where minorities will win with near certainty.

There can be no question that the majority's holding goes far beyond the requirements of § 2. Interpreting § 5 to mandate safe, supermajority districts is not only irreconcilable with the limited procedural purpose of § 5; construing the law in that fashion flies in the face of everything this Court has ever said about § 5. The sole purpose and justification for § 5 is to stop covered jurisdictions from enacting "new *discriminatory* voting laws." *Bossier Parrish II, supra*, at 477 (emphasis added). Conversely, *non-discriminatory* laws must be approved under § 5. *Id.*

The district court's holding that § 5 mandates the drawing of safe minority districts—which cannot arguably be required by § 2—ignores this critical distinction. The district court would permanently enjoin Georgia from using the redistricting scheme chosen by its legislators—black and white—*even though that districting scheme is not discriminatory.*

While this Court may not have unequivocally addressed the precise "safe district" issue presented here under § 5, every word the Court has written about § 5 is consistent with Georgia's position. In *Bush v. Vera*, 517 U.S. 952, 983 (1996), the Court held that § 5 "is not a license for the State to do whatever it deems necessary to ensure continued

electoral *success*; it merely mandates that the minority's *opportunity* to elect representatives of its choice not be diminished . . . by the State's actions." (emphasis in original). Because § 5 does not afford a "license" to States to create safe seats, *a fortiori* § 5 imposes no mandate upon the States to do so.

Nearly three decades ago, this Court first upheld the enactment of a nondiscriminatory election scheme under § 5 that substantially reduced the percentage of minority voters. *City of Richmond v. United States*, 422 U.S. 358 (1975). The Court there upheld an annexation that reduced the minority population of the city from a majority to 42% because the election system provided voters fair opportunities at election. As the Court held, § 5 does not require "permanent overrepresentation" as a price of avoiding retrogression. *Id.* 371.

The Court followed the logic of *City of Richmond* in *United States v. Mississippi*, 444 U.S. 105 (1980), which affirmed the district court's § 5 approval of a redistricting plan that reduced the percentages of blacks in various districts. *See Mississippi v. United States*, 490 F.Supp. 569 (D.D.C. 1979) (three-judge court). The district court in that case, citing *City of Richmond,* had held that "no racial group has a constitutional or statutory right to an apportionment structure designed to maximize its political strength." *Id.* 582.

Judge Oberdorfer's dissent sums up the majority's error in the present case as follows:

> There is no legal authority for the majority's proposition that § 5 requires that a plan preserve a pre-existing probability that a minority choice candidate prevail. To the contrary, the Supreme Court, albeit in the § 2 context, has consistently held that the Voting Rights Act aims to provide nothing more than a fair or equal opportunity, and does not guarantee "safe" seats or a "robust" chance of victory. Other lower courts have

recognized, in the § 5 context, that a plan that preserves or increases the number of districts where minority voters have an equal or reasonable opportunity to elect their candidates of choice is not retrogressive. *See Colleton County Council v. McConnell,* 2002 U.S. Dist. LEXIS 10890 *110, No. 01-3581-10 (D.S.C. Mar. 20, 2002) (three-judge court) (examining the number of majority-minority districts maintained "at a level of equal opportunity"); *see also Ketchum v. Byrne,* 740 F.2d 1398, 1419 (7th Cir. 1984) (defining retrogression as a decrease in "the number of wards in which blacks have a reasonable opportunity to elect a candidate of choice."). This does not conflate a § 5 inquiry with a § 2 inquiry. Rather, it recognizes that a simple comparison of the number of majority-minority districts under the benchmark and proposed plans, although traditionally employed by the courts, is by itself insufficient because it fails to answer the question of whether the majorities are at a level that enables "*effective* exercise of the electoral franchise," *Beer,* 425 U.S. at 141 (emphasis in original; footnote omitted). (J.S.187a-88a).

Judge Oberdorfer's opinion also discusses the unavoidable fact that supermajorities necessarily diminish African American voter influence in other districts. This Court has expressed its concern over this issue before. *See, e.g., Johnson v. DeGrandy, supra*, at 1020, 1029. Judge Oberdorfer discussed this problem as follows:

> Moreover, the continuation of supermajorities . . . diminishes [their] opportunity to influence election elsewhere and "threatens to carry us further from the goal of a political system in which race no longer matters." *DeGrandy*, 512 U.S. at 1029 (Kennedy, J., concurring). A proposed plan that provides a fair opportunity to elect the same or greater number of candidates of choice than the benchmark plan provides is entitled to § 5 preclearance. (J.S.207; some citations omitted).

Indeed, the kind of supermajority districts demanded by the majority below—*over the ardent opposition of the overwhelming majority of Georgia's African American legislators*—raise an obvious question as to whether Georgia would now be liable under § 2 for a minority vote packing case. That possibility has been expressly recognized by previous decisions of this Court. *See, e.g., Quilter v. Voinovich*, 507 U.S. 146, 153-54 (1993). This issue was again discussed by Judge Oberdorfer:

> Indeed, if Georgia had maintained the heavy concentrations of African-American voters in certain of its Senate and House districts, particularly in the metropolitan Atlanta area, black voters in those districts may have had a cognizable § 2 claim based on dilution of their votes through packing. (J.S.206a, n.82).

With the near universal view of minority legislators that supermajorities unnecessarily *wasted* African American votes, and with the evidence establishing an undisputed ability of African American candidates to win in districts with 50% BVAP and lower, a charge of dilution by vote packing would hardly be frivolous.

II. SECTION 5 CANNOT CONSTITUTIONALLY REQUIRE THE DRAWING OF SUPERMAJORITY MINORITY LEGISLATIVE DISTRICTS IN ORDER TO CREATE SAFE SEATS, RATHER THAN SEATS THAT AFFORD MINORITIES EQUAL OPPORTUNITIES TO WIN.

The majority's interpretation of § 5 leads to plainly unconstitutional results. As originally enacted, the Voting Rights Act did not prohibit dilutive voting systems unless the system was itself unconstitutional and motivated by a purpose to discriminate. *Rogers v. Lodge*, 458 U.S. 613 (1982); *City of Mobile v. Bolden*, 446 U.S. 55 (1980). The Act was amended

in 1982 to prohibit electoral systems that "resulted" in discrimination, regardless of purpose. *Thornburg v. Gingles, supra*. Section 2 and § 5 are constitutional even thought they reach practices that have only a discriminatory impact, regardless of purpose. *Lopez v. Monterey County*, 525 U.S. 266, 282-84 (1999); *City of Rome v. United States*, 446 U.S. 156 (1980).

> Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into legislative spheres of autonomy previously reserved to the States. *Lopez, supra* at 282-83.

The constitutional foundation of both § 2 and § 5 is that they provide substantive protection for the legitimate rights of minority voters. By expanding § 5 beyond a ban against discriminatory practices to require that States draw safe minority districts, however, would leave this statute devoid of constitutional footing. Congress is empowered to prohibit the States from maintaining discriminatory voting laws, *Lopez*, but there is no constitutional justification for Congress to mandate the creation of safe seats with guaranteed political outcomes. The very purpose and aim of such a statute would be illegitimate.

In *Bush v. Vera, supra*, the Court addressed the constitutional power of the State to draw districts designed to do more than remedy the kind of vote dilution prohibited by § 2. The Court held in that case that it was unconstitutional for the Texas legislature to draw districts for racial purposes that were not required by § 2. *Here,* the district court's admitted purpose for increasing the BVAPs in Georgia's Senate was not to address voting discrimination—which was at least offered as a justification in the Texas case—but simply to create safe minority seats. Georgia could not constitutionally have drawn such districts for the purpose of creating safe

seats, and § 2 cannot be constitutionally construed to mandate the State to do so. Guaranteeing a particular political result is not a constitutionally legitimate goal.

The inevitable consequences of the district court's ruling point equally to its error. Under the court's holding, demographic changes from one census to another would strip covered States like Georgia of their political choices. Georgia's majority BVAP districts had relatively high black majorities throughout the 1990's. Demographic changes that arose from the 2000 Census raised those BVAPs even further in the existing majority minority districts, which in most cases were far short of population equality. (P.Exs.1D,11D).

According to the district court, the same or a greater number of districts must be maintained as *safe* minority seats. The district court's ruling dictates an inexorable "ratcheting up" process whereby Georgia loses the authority to make reasonable redistricting choices. That is true notwithstanding the fact that its choices are admittedly nondiscriminatory and provide minorities with equal electoral opportunities. Judge Edwards' concurrence recognized that this is exactly what would occur under the court's interpretation of § 5. He referred to the process approvingly as a "one-way ratchet imposed by § 5 [which] means that tangible gains made by African American voters need not be surrendered merely because the State has sought to undo those gains with a plan that is (perhaps) not independently unlawful under § 2." (J.S.152a).

If § 5 were so construed, covered states like Georgia would ultimately have only supermajority, safe districts. Section 5 would ultimately paint Georgia into a corner where its political choices would be ordained by the demographic happenstance of the past. Section 5 would have been applied to mandate what § 2 does not require, *Johnson v. DeGrandy, supra,* and § 5 would have been interpreted to mandate what this Court has repeatedly held to be unconstitutional under

§ 5: the purposeful creation of supermajority districts based predominantly on race. *E.g., Bush v. Vera, supra; Miller v. Johnson, supra.*

III. PRIVATE PARTIES SHOULD NOT BE ALLOWED TO INTERVENE IN A SECTION 5 PRECLEARANCE ACTION AND ASSUME THE ROLE AND AUTHORITY OF THE ATTORNEY GENERAL.

A. Private parties should not be permitted to intervene in a Section 5 case because the statute establishes a unique role for the Attorney General as the defendant in preclearance actions.

The district court first ruled that intervention would not be permitted to allow private parties to challenge a redistricting plan if the DOJ did not oppose the plan. (J.S. 216a). Several days before trial, however, the court reversed itself and permitted the intervenors to contest anything, including the congressional and House plans that were conceded by the DOJ not to be retrogressive. (J.S. 214a).

Section 5 preclearance proceedings are unique statutory creations. No other federal law so upends traditional principles of federalism. *Bossier Parrish I, supra* at 479. Expanding § 5 proceedings to give private citizens the *same power and authority* as the Attorney General would exacerbate a statutory anomaly that is already stretched to the constitutional limit.

In a § 5 administrative submission, the Attorney General alone possesses authority to object to a proposed redistricting plan. *See Morris v. Gressette*, 432 U.S. 491 (1977). In a civil action for preclearance, the Attorney General maintains his unique role as the sole statutorily designated defendant. Not

a word in the Act hints that private citizens should be allowed to intervene and arrogate to themselves the enormous responsibilities and power of the Attorney General.

In *Morris*, the Court recognized that § 5 preclearance determinations have no place for participation by third parties. The Attorney General's failure to object under Section 5 was therefore immune from any subsequent review. The usual authority given private parties under the APA and other statutes to challenge agency decisions is inapplicable under § 5. In so holding, *Morris* emphasized the extraordinarily harsh nature of § 5; the need for expeditious treatment of preclearance claims; the fact that § 5 preclearance does not preclude anyone from challenging the precleared voting practice;[5] and the Attorney General's unique power and duty under § 5. *Id.* 501-07. The same considerations preclude intervention by "private attorneys general."

Other courts have agreed with appellant's opposition to intervention. In *State of Georgia v. Reno*, 881 F.Supp. 7 (D.D.C. 1995), the district court denied intervention in a preclearance action, and that ruling was summarily affirmed by this Court. *Brooks v. Georgia*, 516 U.S. 1021 (1995). While four Justices indicated that they would have remanded the case for further consideration in light of the United States' withdrawal of its appeal, 516 U.S. at 1021, no Justice wrote that the denial of intervention was improper. In other cases under the Voting Rights Act, the district court has held intervention inappropriate because of the Attorney General's unique statutory role. *E.g, Apache County v. United States*, 256 F.Supp. 903 (D.D.C. 1966) (three-judge court)(bailout case under § 4(a)). The court reasoned that "the right enforced by [the statute] is a public right, appertaining not to

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[5] Under the express terms of § 5, the grant of a declaratory judgment in a preclearance action does not prevent voters from pursuing any substantive claims they might have. Section 5 is a purely procedural statute.

individual citizens, but to the United States itself." *Id.* 906. This Court cited *Apache County* with approval in *NAACP v. New York*, 413 U.S. 345, 369 (1973), which upheld denial of intervention in a § 4 action.

States should not be subjected to the whims of intervenors acting like private attorneys general. Expeditious decisions are critical in § 5 actions; they must be rendered prior to the next election. The district court noted that it handled this case "with all possible speed" (J.S.27a), yet it still took eight months to final judgment. *Georgia v. Reno, supra,* went on for five *years* in the district court. The intervenors here expanded the scope of the case from three Senate districts to include the entire Georgia House and congressional plans. They prevented the court from entering a consent decree as to the House and congressional plans, which would otherwise have occurred months before judgment was ultimately entered. In addition to the much greater efficiency of pretrial proceedings that would have resulted from such a consent decree, prompt final judgments would have allowed voters and candidates to know much sooner what the districts would be. Any possibility of settlement discussions regarding the Senate plan were also precluded, as a practical matter, by the intervenors' much broader objections than those of the DOJ. (Tr.76-79, 2/8/02).

More often than not, intervenors have purely political reasons for opposing a voting change, which is just one more reason why intervention is inappropriate in these unique proceedings. Delay alone sometimes wins the day in politics.

B. Even if intervention were ever appropriate, these intervenors had no standing to complain about districts they did not live in.

In *United States v. Hays*, 515 U.S. 737, 744-745 (1995), and *Shaw v. Hunt*, 517 U.S. 899, 904 (1996), the Court held that a plaintiff who resides in a district predominately drawn

based on race has standing to challenge the legislation which created that district, but that a plaintiff in an adjacent district lacks standing. Similarly, in a one person/one vote case, voters have standing to sue when they reside in districts where their votes are arbitrarily "disfavored" and their votes are "less influential" by virtue of the population differences between counties. *Baker v. Carr*, 369 U.S. 186, 206-208 (1962). Voters who do not reside in overpopulated districts do not have standing to challenge an alleged malapportionment because they suffer no harm. *Fairley v. Patterson*, 493 F.2d 598, 603-604 (5th Cir. 1974); *Roxbury Taxpayers Alliance v. Delaware County Board of Supervisors*, 80 F.3d 42, 46-47 (2d Cir.), *cert denied,* 519 U.S. 872 (1996).

The four intervenors in this case challenged Georgia senate districts 2, 12, 15, 22, 26; Georgia house districts 51, 95, 97, 100, 113, 148 and 149; and congressional district 5, all as retrogressive. But none of the intervenors resided in any of the House districts they challenged, and an intervenor resided in only two of the five challenged Senate districts. Nonetheless, the trial court held that, "whether intervenors reside in the proposed or benchmark districts at issue in this matter does not affect their standing for purposes of challenging the redistricting plans as retrogressive. The plans are statewide and the drawing of one district's boundaries necessarily affects neighboring districts." (J.S.30a). The court's ruling is incorrect both factually and legally. Factually, the redrawing of one district will affect one adjoining district (although which one is speculative *a priori*), but it may or may not affect any more than that. There is certainly no basis to assume that changing a single district would have "statewide" impact. The ruling is legally incorrect because it directly contradicts this Court's holding in *Hays*, 515 U.S. at 746.

CONCLUSION

For the foregoing reasons, the State of Georgia respectfully requests that the Court note probable jurisdiction in this matter, set the case for full briefing and argument, and reverse the April 5, 2002, judgment of the district court.

Respectfully submitted,

THURBERT E. BAKER
Attorney General of the State of Georgia

DENNIS R. DUNN
Deputy Attorney General

MARK H. COHEN
Troutman Sanders LLP

THOMAS SAMPSON, SR.
Thomas, Kennedy, Sampson & Patterson

*Counsel of Record

DAVID F. WALBERT *
PARKS, CHESIN, WALBERT & MILLER, P.C.
26th Floor, 75 Fourteenth Street
Atlanta, Georgia 30309
(404) 873-8000

Counsel for Appellant

APPENDIX

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 01-2111 (EGS HTE LFO)

THE STATE OF GEORGIA,

Plaintiff,

v.

JOHN ASHCROFT, *et al.*,

Defendants.

June 3, 2002, Decided

OPINION

Sullivan, *District Judge:*

On April 5, 2002, the court declined judicial preclearance to Georgia Act No. 1EX6, a plan for redistricting of the Georgia State Senate. However, at the request of the State of Georgia, this court maintained jurisdiction of the case and permitted the State to file a new reapportionment plan for the Senate districts. The State now asks this court to enter a declaratory judgment pursuant to Section 5 of the Voting Rights Act that a revised Senate redistricting plan, Georgia Act No. 444, does not "have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color" or membership in a language minority group. 42 U.S.C. § 1973c.

I. Procedural History

On April 5, 2002, this court issued an Opinion and Order ("Opinion") granting the State of Georgia a declaratory judgment under Section 5 of the Voting Rights Act, 42 U.S.C.

§ 1973c, with respect to the Congressional and State House redistricting plans enacted during the 2001 special session of the Georgia General Assembly. *See* Civil Action No. 01-2111, April 5, 2002 Op. & Order. That same Opinion denied the State's motion for declaratory judgment under Section 5 with respect to the State Senate redistricting plan enacted during the 2001 special session, Act No. 1EX6 ("2001 plan").

On April 8, 2002, the State of Georgia requested that this court amend its judgment of April 5, 2002 for the purpose of retaining jurisdiction to consider a revised Senate Redistricting Plan. The United States filed a statement of non-opposition to the State's motion. The defendant-intervenors filed a response to the motion arguing that retention of jurisdiction would be improper and that plaintiff was required to file a new lawsuit in this court, if it intended to seek judicial preclearance. On April 9, 2002, in recognition of the fact that the qualifying period for candidates for the Georgia State Senate is scheduled to be held from June 19 to June 21, the court modified its judgment and retained jurisdiction to permit plaintiff to submit a revised plan for the redistricting of the Georgia State Senate within twenty days.

On April 15, 2002, the defendant-intervenors filed a motion for clarification of the order amending judgment, essentially asking the court to confirm that the burden of proof remained on the State to demonstrate that the revised plan did not violate Section 5.

On April 17, 2002, the State filed the revised Senate redistricting plan ("2002 plan"), passed by the Georgia General Assembly and signed into law as Act No. 444 on April 11, 2002 by the Governor of Georgia. The State, in accordance with court order, also filed a memorandum in support of the plan. At an April 18, 2002 status hearing, plaintiff represented that it did not intend to submit any additional evidence in support of the revised plan and that no discovery was needed. The court ordered the defendants and

defendant-intervenors to notify the court in their responses to the plaintiff's memorandum if they believed that additional discovery was needed. The United States indicated that it no longer contended that the Senate plan violated Section 5, while the defendant-intervenors argued that the State had again failed to meet its burden. No party requested additional discovery or sought to file new evidence with the court.

At the April 18, 2002 status hearing, the court also inquired of the parties whether there was a need to have the plaintiff file a new complaint, or to have the parties file motions for summary judgment. Relying on *Busbee v. Smith*, 549 F. Supp. 494 (D.D.C. 1982),[1] the parties argued that no procedural impediments barred the court from resolving the merits of the case on the basis of the plan and the responses to the plan.

The plaintiff and defendant-intervenors both argue that the evidentiary record developed during the court's review of the 2001 Senate redistricting plan supports their positions. However, the parties' initial briefs failed to point to record evidence to support their positions. The cursory nature of the parties' briefs prompted the court to require the parties to file proposed findings of fact and conclusions of law explicitly identifying the evidence upon which the parties relied.

In a conference call on May 17, 2002,[2] at the suggestion of the court, the parties agreed that, in the event that the court concluded that the evidence raised a genuine issue of material fact, thus precluding the granting of summary judgment, the

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[1] The *Busbee* court, noting the imminence of Congressional elections in November, retained jurisdiction for twenty days to allow the State to submit a revised plan. 549 F. Supp. at 518. After receiving no opposition to the revised plan from defendants or defendant-intervenors, the *Busbee* court issued a short order granting declaratory judgment for the State. *See Busbee v. Smith*, Civ. Action No. 82-0665, Order, Aug. 24, 1982.

[2] At this same conference call, the court indicated that oral argument on the revised plan would not be necessary.

court could resolve the case as a stipulated trial on the record. *See also Benoit v. McKenzie*, Civ. Action No. 84-2657, 1988 WL 4238 (D.D.C. Jan. 5, 1988).

The court treats the plaintiff's submission of the revised Senate redistricting plan as a new complaint for declaratory judgment. Retention of jurisdiction was appropriate and in the interests of justice insofar as a new complaint would have come to this three-judge court as related to the court's previous review of the State's Congressional and State Senate and House redistricting plans. As discussed below, the court construes the case as a stipulated trial on the entire record after finding that genuine issues of material fact preclude entry of summary judgment.

II. Factual Background

The court's April 5, 2002 opinion contains a lengthy discussion of the demographics of the State of Georgia. Therefore, in this section, the court focuses its attention on the differences between the 2001 Senate redistricting plan and the revised 2002 plan.

The April 5, 2002 opinion scrutinized the redistricting proposed for thirteen benchmark Senate Districts with majority African American populations and Senate District 34, which would have become a majority African American district under the 2001 plan. With the exception of Senate Districts 2, 12 and 26, the demographics of these districts are the same under the 2001 plan and under the revised 2002 plan.

The following chart summarizes the percentages of Black population ("BPOP"),[3] Black voting age population

[3] As indicated in the court's April 5 opinion, plaintiff and the United States dispute the method of calculating the African American population of Georgia. *See* Opinion at 22-23. The court will refer to BPOP and BVAP calculated pursuant to Georgia's method of construing the census data. The United States has not presented any additional evidence;

("BVAP") and Black registered voters ("BREG") in Senate Districts 2, 12 and 26 under the benchmark plan ("BM"), the 2001 plan ("2001") rejected by the court and the 2002 plan ("2002") submitted for review.

S.D.	BPOP			BVAP			BREG		
	BM	2001	2002	BM	2001	2002	BM	2001	2002
2	65.46	55.60	59.47	60.58	50.31	54.50	62.38	48.50	55.80
12	59.88	54.01	58.66	55.43	50.66	55.04	52.48	47.76	51.58
26	67.24	55.36	60.32	62.51	50.80	55.45	62.93	48.68	54.70

See Pl.'s Proposed Findings of Fact & Conclusions of Law ("PPFF") at P 28.

The benchmark plan has thirteen districts with majority African American populations. These same thirteen districts have populations in which the majority of registered voters are African American. Twelve benchmark districts have majorities of BVAP ranging from 54.73% to 88.91%, and benchmark Senate District 44 has a BVAP of 49.62%.

The 2002 plan proposes thirteen districts with majority African American populations. Eleven proposed districts would have majorities of African American registered voters. Proposed Senate Districts 22 and 34 would have populations where registered voters were respectively 49.44% and 49.50% African American. Under the 2002 plan, according to Georgia's calculation of BVAP, thirteen districts would have majority BVAPs, ranging from 50.54% to 64.14%.

The BVAP of Senate District 34, the newly created majority-minority district, falls slightly below 50% to 49.53% when BVAP is calculated according to the United States' methodology. *See* U.S. Ex. 110; April 5, 2002 Op. & Order

consequently, the court is unable to determine the relevant BPOP and BVAP percentages under the revised plan pursuant to the Attorney General's method of interpreting the census data.

at 65. Consequently, pursuant to the United States' calculations, there would be twelve districts with majority BVAPs under the revised plan.

The boundaries of Senate Districts 2, 12 and 26, as drawn by the 2002 plan differ in several significant ways from those drawn by the 2001 plan. Essentially, the districts have been created with an eye toward maintaining minority voting strength by keeping within the districts majority African American precincts that fall within the current benchmark districts. In addition, the revised plan's districts would not include majority white precincts that are not within the benchmark districts, but which the 2001 plan had proposed to add to Districts 2, 12 and 26.

In particular, unlike the 2001 plan, the 2002 plan would not include Tybee Island, Whitemarsh and Isle of Hope in Senate District 2. *See* Pl. Ex. 31A. The Port Wentworth community, as well as the majority African American precincts of Secondary Tech, Garden City Community Center and Wilder Memorial Baptist, would be included in Senate District 2 under the revised plan. *Id.*

The revised plan would keep within Senate District 12 three precincts with majority African American registration figures, which had been removed under the 2001 plan. In addition, the predominantly white precincts of Raiford, Putney and Century, included in Senate District 12 under the 2001 plan, would not be included in the revised District 12. *Compare* Pl. Ex. 4A *with* Pl. Ex. 32A.

In Senate District 26, the revised plan would include significant portions of Twiggs and Wilkinson counties, including the City of Jeffersonville, which have substantial African American populations. Pl. Ex. 33A. Several predominantly rural, white precincts in Monroe, Butts, Jones and Jasper Counties are not included in the 2002 plan's Senate District 26. These precincts had been included in the 2001 plan's proposed district.

III. Standard of Review

As an initial matter, the court addresses the plaintiff's repeated assertions that some different standard or quantum of proof is applicable because this case is now in a "remedial" posture. Plaintiff, with the agreement of the United States and defendant-intervenors, initially cited *Busbee v. Smith* for the proposition that this court could properly retain jurisdiction in order to permit the State to submit a revised redistricting plan. 549 F. Supp. 494 (D.D.C. 1982). However, plaintiff also relies on *Busbee* to support a conclusion that this matter is in a "remedial" posture. While continuing to recognize that it bears the burden of proof, the State suggests that the "remedial" nature of the court's present review mandates a more flexible procedural and evidentiary standard.

The court wholly rejects the idea that its current review may be in any way less searching or comprehensive than its former review of the 2001 plan. Indeed, on this point *Busbee* is instructive. The *Busbee* court refused to preclear Georgia's Congressional redistricting plan because it found that the boundary between the Fourth and Fifth Congressional Districts, which essentially bifurcated a concentrated African American population, had been drawn with a discriminatory purpose. 549 F. Supp. at 517-18. When the State suggested that the court's order applied only to the Fourth and Fifth Districts, and manifested an intent to go forward with elections in the remaining Congressional Districts, the Court clarified that it had found that the redistricting plan "as a whole" was in violation of Section 5 and unenforceable. Civ. Action 82-0665, Order, Aug. 2, 1982, at 2 (emphasis in original). Thus, while the State legislature ultimately chose to redraw only the Fourth and Fifth Districts, the court explicitly recognized the possibility that a revised plan might affect other districts." *Id.* Similarly, we have emphasized that, although we have focused on three individual Senate

Districts, we are obligated to consider whether the plan as a whole contravenes Section 5. This obligation is unchanged by the submission of a second, revised plan.

Plaintiff bears the burden of demonstrating by a preponderance of the evidence that the 2002 Senate redistricting plan does not have a retrogressive purpose and will not have a retrogressive effect. *See City of Pleasant Grove v. United States*, 479 U.S. 462, 469, 107 S. Ct. 794, 93 L. Ed. 2d 866 (1987). "A preponderance standard . . . requires merely that the fact-finder believe that the existence of a fact is more probable than the non-existence of that fact." *United States v. Smith*, 267 F.3d 1154, 1161 (D.C. Cir. 2001). In other words, "'the burden of showing something by a preponderance of the evidence . . . simply requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence before [the trier of fact] may find in favor of the party who has the burden to persuade the [court] of the fact's existence.'" *Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 137 n.9, 117 S. Ct. 1953, 138 L. Ed. 2d 327 (1997) (quoting *Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust for Southern Cal.*, 508 U.S. 602, 622, 113 S. Ct. 2264, 124 L. Ed. 2d 539 (1993)). Thus, for the plaintiff to succeed at a stipulated trial, this court need only find that the evidence that the revised Senate redistricting plan will not have a retrogressive effect is more convincing than the evidence offered to prove that the plan will result in retrogression. *See id.* (citing *Greenwich Collieries v. Director, OWCP*, 990 F.2d 730 (3d Cir. 1993)).

Because we find that there are genuine issues of material facts in dispute that preclude the entry of summary judgment, *see Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986), we treat the case as a stipulated trial on the entire record. In considering the case as a stipulated trial, the court takes on the role of fact-finder. Thus, the State may prevail if the court determines that the evidentiary record

supports a finding that it is more probable than not that the revised redistricting plan for the State Senate will not violate Section 5.

IV. Analysis

Plaintiff seeks a declaratory judgment pursuant to Section 5 that the 2002 redistricting plan for the Georgia State Senate does not "have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color" or membership in a language minority group. 42 U.S.C. § 1973c. *Beer v. United States* teaches that Section 5 mandates that a voting change submitted for preclearance not be retrogressive in its effect; a covered jurisdiction may not enact a voting change that directly or indirectly diminishes the opportunities of African American voters to exercise their electoral power. 425 U.S. 130, 141, 96 S. Ct. 1357, 1364, 47 L. Ed. 2d 629 (1976). Similarly, *Reno v. Bossier Parish School Board* instructs that only a retrogressive purpose will violate Section 5. 528 U.S. 320, 341, 120 S. Ct. 866, 145 L. Ed. 2d 845 ("Bossier II"). We address the effect and purpose prongs of the Section 5 inquiry in turn.

A. Non-retrogressive Effect

1. Legal Standard

The court is faced with the challenge of predicting the effect of the revised Senate redistricting plan on African American voting strength in Georgia. Plaintiff has offered little additional evidence in support of the revised plan, while defendant-intervenors have chosen to present no new evidence, maintaining only that the State has failed to meet its burden of proof. The United States does not contend that the revised plan has a retrogressive effect and has presented no additional evidence.

Although the Attorney General does not contend that the revised plan is retrogressive, the State has chosen not to

submit the plan to the Attorney General for administrative preclearance. For the reasons outlined in the April 5, 2002 majority opinion, the court has determined that the failure of the Attorney General to object to a plan does not moot the controversy, and that the court must hold the plaintiff to its burden of demonstrating that the proposed plan does not have a retrogressive effect or purpose.

We have previously rejected the notion that the court's retrogression analysis is limited to a few disputed districts, holding that a Section 5 action necessarily calls for an analysis of the entire plan and its predicted effect. April 5, 2002 Op. & Order, at 107. Nevertheless, the April 5, 2002 opinion focused on three proposed Senate Districts where there was evidence of racially polarized voting, which, when coupled with the demographics of the proposed districts, we found likely to result in a retrogressive effect.

Our previous opinion discusses at length the appropriate legal standard for assessing retrogression, and we review this standard here only briefly. Section 5 is a mandate that "the minority's opportunity to elect representatives of its choice not be diminished, directly or indirectly, by the State's actions." *Bush v. Vera*, 517 U.S. 952, 983, 116 S. Ct. 1941, 135 L. Ed. 2d 248 (1966). Whether a given plan will have a retrogressive effect is a fact-specific inquiry that focuses on whether a proposed voting change will diminish minority voting strength throughout the given jurisdiction.

As discussed in the April 5, 2002 Opinion, courts have frequently used the number of majority-minority districts as a shorthand for measuring minority voting strength. However, we also noted the dualistic nature of majority-minority districts. Such districts may increase minority voting strength where voting patterns are such that only a majority or super-majority of minority voters will permit the election of minority candidates of choice. Yet, they may also diminish or stagnate minority voting strength by "packing" minority

voters into a small number of districts, thus foreclosing the voters' ability to influence the outcome of elections in a greater number of districts.

Thus, finding that the "shorthand" method of counting majority-minority districts would not necessarily reflect a plan's predicted effect on minority voting strength, the court undertook a careful, fact-intensive analysis of the full range of evidence presented to it. In particular, the court considered demographic evidence regarding the proposed plan, evidence of racial voting patterns and lay testimony regarding the predicted effect of the plan. In addition, the court rejected the State's argument that the proposed Senate plan was an inevitable result of compliance with the constitutional principle of one person, one vote.[4] The court, however, was significantly hampered in its consideration of the issues by the failure of the parties to submit expert testimony addressing the relative effect of the 2001 plan on African American voting strength throughout the State.

2. Opportunities to elect candidates of choice

The crux of the court's finding that the 2001 Senate redistricting plan was more likely than not to diminish African American voting strength lies in the interplay between decreases in several majority-minority districts' BVAPs and evidence of significantly racially polarized

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[4] The State and the defendant-intervenors appear to view the court's discussion of the constitutional principle of one person, one vote as an evidentiary factor to consider in determining whether the plan is retrogressive. However, the court's concern with one person, one vote principles stems from the State's argument, made in its briefs in support of the first Senate redistricting plan, that the decrease in BVAP in several of the majority-minority districts was inevitable and mandated by the constitutional principle of one person, one vote. The court rejected this "defense," finding that the State had offered no proof that such decreases were necessary for constitutional compliance, and that, indeed, the evidence suggested otherwise.

voting. Although the court has commented extensively on this relationship between racially polarized voting and the demographics of the proposed districts, the State and defendant-intervenors would have the court analyze these two factors in isolation from one another. Such an approach misses the mark because it fails to explain the ultimate effect of the plan on African American voting strength in the State. As the court noted in its April 5, 2002 Opinion, "where there is evidence of racially polarized voting, a redistricting plan that reduces African American votes in a district with no offsetting gains elsewhere raises the specter of impermissible retrogression." April 5, 2002 Op. & Order, at 5.

Nevertheless, contrary to the suggestion of defendant-intervenors, the State need not prove the "absence" of racially polarized voting. Clearly, this Section 5 does not require. Rather, the State must demonstrate that, to the extent that racially polarized voting *does* exist, the configuration of the proposed Senate Districts is not such that the plan, as a whole, will diminish African American voting strength.

The presence of racially polarized voting, and its effect on the redrawn districts, is a complicated matter. Nevertheless, as we have already remarked, the court's task is made more difficult by the failure of the parties to present evidence that would explain with precision how the degree of racially polarized voting found by Dr. Engstrom will affect minority voting strength in districts with the demographics proposed by the 2002 redistricting plan.

When compared with the 2001 proposed Senate plan, only the boundaries, and hence the demographics, of Senate Districts 2, 12 and 26 have been altered in the revised 2002 plan. The court previously expressed concern that the BVAPs in five districts, including districts 2, 12 and 26, were reduced to bare majorities. However, the court focused its attention on districts 2, 12 and 26 because there was evidence of racially polarized voting in those districts that suggested that the

accompanying reduction of BVAP to bare majorities would result in a retrogressive effect. The court held that the State had failed to meet its burden because it was more likely than not that racially polarized voting in these three districts with bare majorities of BVAP would result in a state-wide diminution of minority voting strength.

There is still cause for concern under the 2002 redistricting plan. The 2002 plan calls for bare majorities of BVAP in Senate Districts 15 and 34, and a decrease of 12% that brings Senate District 22's BVAP to 51.51%. While there are thirteen districts with majority BVAP according to the State's calculations of BVAP, the BVAPs in eight of these proposed districts would decrease as compared with the benchmark plan. These decreases range from 26.28% to 0.39%.[5]

On the other hand, the revised plan differs from the 2001 proposed plan in significant ways. Of the majority-minority districts created under the 2001 plan, six of the districts had BVAPs between 50.3% and 51.5%. *See* April 5, 2002 Op. & Order at 96. The revised plan has only two districts in this range, Senate District 15 and the newly created majority African American district, Senate District 34. Pl. Ex. 30C. Senate District 22 is just slightly above this range with a BVAP of 51.51%. There are 10 districts in the revised plan with a BVAP over 54%. While under the benchmark plan, all of the majority-minority districts had BVAP percentages greater than 54%, only seven districts in the 2001 plan had BVAP percentages above 54%.

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[5] Specifically, a comparison of the demographics of Senate districts (S.D.) under the benchmark plan and the revised 2002 plan shows the following changes in the districts' BVAP: in S.D. 43, -26.28%; in S.D. 38, -16.32%; in S.D. 35, -15.33%; in S.D. 44, -14.91%; in S.D. 22, -12.00%; in S.D. 55, -11.76%; in S.D. 15, -11.18%; in S.D. 26, -7.06%; in S.D. 10, -6.52%; in S.D. 2, -6.08%; in S.D. 36, -3.42%; in S.D. 12, -0.39%; in S.D. 39, 1.81%; in S.D. 34, 16.58%. U.S. Ex. 118; PPFF P 28; Pl. Ex. 25, app. III.

The likelihood that retrogression will result from the 2002 plan is significantly less where the demographics of the districts with evidence of racially polarized voting are changed to include higher percentages of BVAP. The effect of racially polarized voting on minority voting strength is clearly dependent on the demographics of a given district. In some districts, the impact of even severely polarized voting patterns may be minimal. For example, in a district with 70% BVAP, if a substantial majority of African American voters cast their ballots for a candidate, that candidate is likely to be elected, even absent significant cross-over support from non-African American voters. In contrast, in a district with a bare majority of African American voting age population, even if a substantial majority of African Americans were to vote for a candidate, the outcome of the election is likely to be largely determined by the level of non-African American cross-over support for that candidate.

The only evidence of racially polarized voting before the court is in Senate Districts 2, 12 and 26. Under the revised Senate redistricting plan, the BVAP in Senate District 12 would remain practically the same, decreasing 0.39% from 55.43% to 55.04%. BVAP in Senate District 2 would decrease from 60.58% to 54.5% under the revised plan, and BVAP in Senate District 26 would decrease from 62.51% to 55.45%.

The court is faced with the same evidence of racially polarized voting that it considered in reviewing the 2001 Senate plan. Despite lengthy discussion by the court of how the plaintiff might counter evidence of racial polarization in these districts, plaintiff has chosen to offer no evidence to rebut the evidence presented by Dr. Engstrom and credited by the court. Therefore, the court continues to credit the findings of Dr. Engstrom. In particular, Dr. Engstrom found levels of white support for African American candidates of choice

ranging from 8.9% to 43.6% [6] in Senate elections in benchmark district 2, ranging from 10.6% to 17.5% in Senate elections in benchmark district 12, and ranging from 2.7% to 34.2% in Bibb County elections, which appears to fall within Senate District 26. U.S. Ex. 601, Table 2.

The principle of non-retrogression means that Georgia's redistricting plan may not decrease African American voters' opportunities to elect candidates of choice. However, where racially polarized voting was present in a district under the benchmark plan and the BVAP of a district does not change, we cannot say that the persistence of racially polarized voting in any way decreases overall African American voting strength. Racially polarized voting in Senate District 12 is unlikely to result in retrogression because the district's BVAP is maintained at essentially the same level under the revised plan. There is no record evidence that would suggest that a 0.39% decrease in BVAP will result in a decrease in African American voting strength in the district, or will affect the overall impact of the plan.

The court is left to assess the impact of the decreases in BVAPs of Senate Districts 2 and 26, given the level of racially polarized voting in those districts. The task presented is perhaps more difficult than our analysis of the previous Senate redistricting plan, where the parties created a voluminous record. Here, the State does not attempt to predict the impact of the decreases in BVAP given the evidence of racially polarized voting. Rather, Georgia simply states that the BVAP percentages in the proposed Senate Districts 2 and 26 are greater than they were in the first proposed redistricting. Defendant-intervenors, on the other hand, appear to rely on the unfounded proposition that the presence of any racially polarized voting means that a district—and hence the plan—is retrogressive.

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[6] The court relies on Dr. Engstrom's calculations of white cross-over voting calculated pursuant to King's Ecological Inference.

In the absence of any record evidence that specifically addresses the predicted impact of the levels of racially polarized voting found in Senate Districts 2 and 26 on the ability of African American voters to elect candidates of choice in the redrawn districts, the court turns to other record evidence that touches on this issue.[7]

First, the court notes that, according to the election database compiled in Dr. David Epstein's report, since 1991, the African American candidate of choice won every open seat legislative election in Georgia where the BVAP was 54.00% or higher. Pl. Ex. 25. Epstein presents no evidence of the level of racial polarization in the districts included in his database. Nevertheless, it is not insignificant that the revised Senate Districts 2 and 26 would have BVAP above 54.00%.

Furthermore, we note that our previous concerns that Senate Districts 2, 12 and 26 had BVAP percentages that placed them at the steepest portion of Dr. Epstein's "S curve," are no longer as weighty. While Dr. Epstein's analysis does not account for racially polarized voting, some level of racially polarized voting was necessarily a factor in the election results that he considered. In other words, it would appear to be a reasonable inference that, even with some level of racially polarized voting, as BVAP in a district moves progressively above a bare majority, the likelihood that an African American candidate of choice will be elected also

[7] Plaintiff attempts to rely on an answer by the United State's expert, Dr. Engstrom, to a hypothetical question posed by plaintiff's counsel. Dr. Engstrom testified that, in a district with 50% BVAP, where 90% of African Americans voted for Democratic candidates and 30% of white voters would "cross-over" to vote for a Democratic Party candidate, and all African American voters cast their ballots for the same candidate, he would expect the African American candidate of choice, the Democratic Party candidate, to win 65% of the votes. *See* Tr., 2/6/02 p.m. at 141-44. However, the assumptions underlying this hypothetical are not supported by the record.

increases. Unfortunately, given the quality of evidence, we simply can not predict with any certainty the degree to which that likelihood will increase.

3. Lay testimony

The United States' witnesses, residents of Senate Districts 2, 12 and 26, raised two types of concerns with the first proposed Senate plan. First, they testified that the removal of particular precincts from the districts, and the addition of others, would decrease the probability that an African American candidate of choice would be elected from the districts. Second, several of the witnesses testified that a bare majority of BVAP would not permit the election of an African American candidate of choice.

Several residents from Senate District 2 testified that the addition of Tybee Island, Isle of Hope and Whitemarsh areas would make it more difficult to elect African American candidates of choice because voters in those areas were predominantly white and conservative. The revised plan would remove these areas from Senate District 2, while adding majority black precincts in areas such as Garden City. Pl. Ex. 31A. In particular, Joe Murray Rivers, Chatham County Commissioner, testified that the removal of the precincts Secondary Tech, Garden City Community Center and Wilder Memorial Baptist would diminish African American electoral strength in Senate District 2. U.S. Ex. 508 PP 8-10. These three precincts are included in Senate District 2 pursuant to the revised plan. Pl. Ex. 31A. The defendant-intervenors Della Steel and Georgia Benton testified that they objected to the Senate redistricting plan because Port Wentworth was removed from Senate District 2. Pl. Dep. Design. Tabs 3 (Benton), 27 (Steele). Port Wentworth is now contained within Senate District 2. Pl. Ex. 31A.

Several of the United States' witnesses from Senate District 12 voiced concerns that the 2001 plan for would have removed from the district Doughtery County precincts with

majorities of African American registered voters. *See* U.S. Ex. 513, PP 24, 25 (J. White decl.); U.S. Ex. 511 P 5 (A. Williams decl.); U.S. Ex. 514, P 7 (W. Wright decl.). Senate District 12, as drawn in the 2002 plan, includes three such precincts. Pl. Ex. 32A (Mock Road, Turner and Albany Middle School precincts from Doughtery County). In addition, three majority white precincts, which had been included in the district proposed by the 2001 plan and which witnesses testified would diminish minority voting strength in the district, have been removed from the district in the revised plan.

The precincts identified by the United States witnesses as problematic in proposed Senate District 26 have also been removed in the district drawn by the 2002 plan. In particular, the predominantly rural white precincts that Albert Abrams, a member of the Board of Directors for the Macon Chamber of Commerce, argued would decrease African American voting strength, are not within the redrawn district. *See* U.S. Ex. 515 PP 8-9 (Abrams decl.); Pl. Ex. 33A (majority white precincts of Monroe, Butts, Jones and Jasper Counties have been removed from revised District 26); *see also* U.S. Ex. 519, P 9 (Hart decl.) (testifying that inclusion of precincts from northern Bibb, Butts, Jones and Monroe counties would decrease likelihood that minority candidate would be elected). Majority African American precincts from Twiggs and Wilkinson Counties, which are currently within Senate District 26, would remain within the district pursuant to the 2002 plan. Burt Bivins, a member of the Bibb County Commission had identified these counties and, in particular, the City of Jeffersonville, as important areas to include in Senate District 26 to maintain minority voting strength in the district. U.S. Ex. 517, P 12 (Bivins decl.).

The court places less confidence in the Senate District residents' assessment of the level of BVAP necessary to ensure that African American candidates of choice be elected. While the witnesses may obviously draw on their political

experience in the districts, the court is uncomfortable with identifying any "magic number" as the level of BVAP at which it can conclude African American voting strength has not been reduced. Nevertheless, it is telling that some of the witnesses testified that the closeness of the ratio of African American to non-African American population in the districts proposed by the 2001 plan would significantly affect minority voting strength. *See* Shinhoster dep. at 16. In the 2002 plan's proposed Senate Districts 2, 12 and 26, such bare majorities are no longer present.

4. Overall effect of the 2002 plan

Based on the evidence before us, we can not conclude that it is more probable than not that the 2002 plan will result in a reduction of African American voting strength. The 2002 plan decreases BVAP in the same number of majority-minority districts as did the 2001 plan. However, according to the plaintiff's methodology of calculating BVAP, the 2002 plan has thirteen districts with majority BVAP, where the benchmark plan only has twelve. While recognizing that benchmark Senate District 44 has a BVAP just under 50%, the difference of an additional district with a BVAP that is greater than 50% is not insignificant for African American voting strength.

The court, in its April 5, 2002 Opinion, was most concerned by the evidence regarding voting patterns in Senate Districts 2, 12 and 26. The evidence of racially polarized voting in these districts, in conjunction with the bare majorities of BVAP in the proposed districts, led the court to conclude that the 2001 plan was more likely than not to have a retrogressive effect.

The 2002 plan presents concerns similar to those raised by the 2001 plan. Nevertheless, the BVAP in proposed Senate District 12 is essentially the same as that in the benchmark

district. Consequently, the effect of racially polarized voting in the proposed district is not likely to be any different than its current effect.

The effect of the 2001 plan on minority voting strength in Senate Districts 2 and 26 is more difficult to ascertain. The revised plan addresses district residents' concerns about particular precincts, the inclusion or exclusion of which the residents testified would negatively affect minority voting strength. Thus, the court's inquiry comes down to the question of whether racially polarized voting in the proposed Senate Districts 2 and 26 would so negatively affect African American electoral strength in those districts that the court can find that the 2002 plan would have a retrogressive effect.

We, therefore, consider the evidence of racially polarized voting in proposed Senate District 2, which has a BVAP of 54.50%, and in proposed Senate District 26, with 55.45% BVAP, in conjunction with the fact that the 2002 plan addresses district residents' concerns regarding specific precincts and the addition of a majority-BVAP district. On the basis of the evidence, we find that it is more probable than not that the 2002 plan will not have a retrogressive effect on African American voting strength in the State of Georgia.

B. Non-retrogressive Purpose

Section 5 requires that the covered jurisdiction demonstrate by a preponderance of the evidence that the proposed voting change was not enacted with a retrogressive purpose. *Bossier II*, 528 U.S. 320, 341, 145 L. Ed. 2d 845, 120 S. Ct. 866. While the plaintiff has not submitted any additional evidence other than the 2002 plan itself and the roll call of the General Assembly's vote on the plan, the court concludes that it can draw a reasonable inference from the course of events and from the nature of the changes made to Senate Districts 2, 12 and 26 that the revised plan was not created to further any retrogressive intent.

CONCLUSION

Upon careful consideration of the entire record herein and the applicable statutory and case law, the court finds that the State of Georgia has demonstrated by a preponderance of the evidence that the State Senate redistricting plan, Georgia Act No. 444, does not have the purpose or effect of denying or abridging the right to vote on account of race or color. Accordingly, it is hereby

ORDERED that plaintiff's request for a declaratory judgment pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, that the revised Senate redistricting plan, Act. No. 444, does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color or membership in a language minority group is GRANTED.

An appropriate Judgment accompanies this Opinion and Order.

DATE 6/03/02

/s/ _____
EMMET G. SULLIVAN
UNITED STATES DISTRICT JUDGE

DATE: 6/03/02

/s/ _____
HARRY T. EDWARDS
UNITED STATES CIRCUIT JUDGE

DATE: 6/03/02

/s/ _____
LOUIS F. OBERDORFER
UNITED STATES DISTRICT JUDGE

JUDGMENT

Pursuant to Federal Rule of Civil Procedure 58 and for the reasons stated by the court in its Memorandum Opinion and Order docketed this same day, it is hereby

ORDERED and ADJUDGED that the Clerk shall enter final judgment in favor of plaintiff with respect to Georgia's State Senate reapportionment plan, Act No. 444.

IT IS SO ORDERED FOR THE THREE-JUDGE COURT.

DATE: 6/03/02

/s/ _____
EMMET G. SULLIVAN
UNITED STATES DISTRICT JUDGE

OBERDORFER, J., concurring.

I concur in the court's opinion for substantially the reasons there stated, together with those advanced in my dissent from the court's April 5, 2002 opinion related to the state Senate.

June 3, 2002

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 01-2111

THE STATE OF GEORGIA,
Plaintiff,

v.

JOHN ASHCROFT, *et al.*,
Defendants.

April 5, 2002, Decided

OPINION

Sullivan, *District Judge*:

This is an action for declaratory judgment commenced by the State of Georgia under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c (1994) ("Section 5"). The State seeks a declaratory judgment that the redistricting plans passed by the Georgia General Assembly for the United States Congressional seats and the State Senate and House seats do not "have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color" or membership in a language minority group. 42 U.S.C. § 1973c.

The Voting Rights Act imposes weighty obligations on jurisdictions with a history of racial discrimination in their electoral processes.[1] Congress enacted the Act with the "firm

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[1] Covered jurisdictions are determined by Section 4 of the Act, 42 U.S.C. § 1973b(b) (2001), and include states where voter participation

intent[] to rid the country of racial discrimination in voting" by a "complex scheme of stringent remedies." South *Carolina v. Katzenbach*, 383 U.S. 301, 315, 86 S. Ct. 803, 812, 15 L. Ed. 2d 769 (1966). The Georgia General Assembly is well aware of its statutory and constitutional responsibilities, as the State has spent much of the last decade defending its legislative reapportionment plans against claims of racial gerrymandering, brought pursuant to Section 2 of the Voting Rights Act and the United States Constitution. *See, e.g., Abrams v. Johnson*, 521 U.S. 74, 117 S. Ct. 1925, 138 L. Ed. 2d 285 (1997) (affirming court-ordered Congressional redistricting plan); *Miller v. Johnson*, 515 U.S. 900, 115 S. Ct. 2475, 132 L. Ed. 2d 762 (1995) (holding that Congressional redistricting plan violated equal protection clause).

The State's obligations under Section 5, however, differ significantly from those under Section 2 of the Voting Rights Act [2]. Section 5 requires specific jurisdictions to comply with "preclearance" procedures before implementing any new "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting." [3] 42 U.S.C.

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was below 50% in 1964, and where a test or device was used to determine eligibility to vote in that year. Id. Georgia is a covered jurisdiction. 28 C.F.R. § 51, App. (Mar. 5, 2002).

[2] Section 2 of the Voting Rights Act provides that "no voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973(a).

[3] Section 5 provides:

> Whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: Provided, that such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the Attorney General's failure to object nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court.
>
> 42 U.S.C. § 1973c (1994).

§ 1973c. Two avenues for preclearance are provided by the Act. *Id.* The covered jurisdiction may seek a declaratory judgment from a three-judge District Court for the District of Columbia that the new practice does not have the purpose or effect of denying or abridging the right to vote on account of race or color. *Id.* In the alternative, the jurisdiction may submit its proposed procedures to the Attorney General for approval; the procedures are deemed approved if, after 60 days following the filing of a completed submission, the Attorney General has not raised any objections to the proposed procedures. *Id.*

The Supreme Court has characterized Section 5 as "an unusual, and in some aspects a severe, procedure for insuring that states would not discriminate on the basis of race in the enforcement of their voting laws." *Allen v. State Board of*

Elections, 393 U.S. 544, 556, 89 S. Ct. 817, 22 L. Ed. 2d 1 (1969). Section 5 was intended to provide an efficient and rapid mechanism for preclearing changes in voting procedures, while expressly providing that such preclearance in no way affects the ability of individuals to challenge that plan on other grounds. *Id.* at 549, 556.

Section 5 prohibits States from diminishing the opportunities of African American voters to exercise their electoral power. *Beer v. United States*, 425 U.S. 130, 141, 96 S. Ct. 1357, 1364, 47 L. Ed. 2d 629 (1976). Georgia has demonstrated that African American voters increasingly have been able to make their voices heard at the ballot. The record indicates, however, that there are areas within the State where racially polarized voting persists. In these areas, white voters consistently vote against the preferred candidates of African Americans in local and district elections, so the strength of African American votes rests in substantial part on the sheer numbers of African American voters in a district. Where there is evidence of racially polarized voting, a redistricting plan that reduces African American votes in a district with no offsetting gains elsewhere raises the specter of impermissible retrogression. In this situation, the State is hard-pressed to demonstrate that there has been no "backsliding" in African American voting strength. *Reno v. Bossier Parris School Bd.*, 528 U.S. 320, 335, 120 S. Ct. 866, 145 L. Ed. 2d 845 ("Bossier II"). And such a failure is fatal in a Section 5 case, because the burden is on the State to show that the redistricting plan will not adversely affect the opportunities of African American voters to effectively exercise their electoral franchise. *Beer*, 425 U.S. at 141.

After carefully reviewing the evidence in the record before us, we hereby grant a declaratory judgment that the United States Congressional redistricting plan, Act No. 2EX11, and the State House redistricting plan, Act No. 2EX23, satisfy the requirements of Section 5. We hold, however, that the State

of Georgia has not met its burden of proof under Section 5 with regard to the State Senate redistricting plan. The State has not demonstrated by a preponderance of the evidence that the State Senate redistricting plan does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color. Accordingly, the State's request for a declaratory judgment that the State Senate plan meets the requirements of Section 5 is denied.

I. Procedural History and Preliminary Matters

In this case, the State has foregone the option of applying to the Attorney General for preclearance of its redistricting plans, and has filed suit in this court. Section 5 essentially freezes the existing districting plans in Georgia unless and until a declaratory judgment is obtained from this court that the proposed reapportionment plans are without discriminatory purpose or effect. *Reno v. Bossier Parris School Bd.*, 520 U.S. 471, 477, 117 S. Ct. 1491, 137 L. Ed. 2d 730 (1997) ("*Bossier I*"). The State of Georgia filed suit on October 10, 2001, requesting that the court enter a declaratory judgment that the Congressional, State House and State Senate plans do not have a discriminatory purpose or effect. Georgia's general primary is scheduled for July 16, 2002, and the State has recently received preclearance to allow candidates for Congress and the state legislature to qualify for the primary from June 10 to June 21, 2002. *See* Defs.' Opp'n to Mot. for Expedited Trial at 6 (discussing November 26, 2001 preclearance of Georgia Act 2EX 10 (2001)). In light of the "extraordinary" remedy mandated by the Voting Rights Act, the court has acted with all possible speed to expeditiously resolve this matter. *Allen*, 393 U.S. at 563.

The court's scheduling order set a demanding briefing schedule, while permitting the parties to engage in extensive discovery up until the commencement of the trial. *See* Order, Civ. Action No. 01-2111, Dec. 20, 2001. Indeed, with the

consent of the parties, commencement of the trial was deferred for three days to enable the parties to complete discovery.

At the time of the initial scheduling conference, the United States had not yet identified its position with respect to each of the submitted plans. Upon consideration of a motion by the State of Georgia, a response thereto and oral argument at the scheduling conference, the court required the United States to identify its legal position by no later than December 31, 2001.

Two motions to intervene were filed early in the proceedings, one by four African American citizens of Georgia, Patrick Jones, Roielle Tyra, Della Steele and Georgia Benton ("Jones"), and one by Michael King, an African American lawyer and resident of Senate District 44. Both motions were denied without prejudice following the court's order that the United States identify its legal position. Order, Civil Action No. 01-2111, Dec. 20, 2001; Order, Civil Action No. 01-2111, Dec. 21, 2001. The court invited the movants to file *amicus curiae* briefs, but held that, without clarification of the United States' legal position, it could not determine if the existing parties adequately represented the interests of the putative intervenors. *See* Fed. R. Civ. P. 24(a).

On December 31, 2001, the United States identified its position with respect to the proposed redistricting plans. On January 4, 2002, Jones filed a renewed motion to intervene. After receiving a response and reply to this motion, on January 10, 2002, the court granted Jones' motion to intervene and required the intervenors to comply with the Court's initial scheduling and pretrial order. *See* Order, Civil Action No. 01-2111, Jan. 10, 2002 (granting intervention as to State House and State Senate plans); Order, Civil Action No. 01-2111, Jan. 30, 2002 (granting intervention as to

Congressional redistricting plans). As discussed below, Mr. King renewed his motion to intervene in an untimely fashion, and was denied leave to intervene.

With the consent of the parties, Judge Sullivan presided over the four-day trial.[4] Following the conclusion of the trial, the parties submitted proposed findings of fact and conclusions of law, and post-trial memoranda of law. Closing arguments were heard by the three-judge panel on February 26, 2002.

There are several preliminary matters that the court must address before focusing on the three reapportionment plans. Pending before the court are: (1) a motion for leave to file an amicus curiae brief submitted by the American Civil Liberties Union ("ACLU"); (2) plaintiff's motion to strike the Jones intervenors for lack of standing; (3) Mr. King's motion to stay proceedings and motion for reconsideration of his motion to intervene; and (4) defendants' and intervenors' motions to exclude portions of plaintiff's expert testimony.

A. ACLU's Motion for Leave to Participate as *Amicus Curiae*

The ACLU has moved the court for leave to participate as amicus curiae in this case in support of defendants' position that the Senate Plan is retrogressive. The court is of the opinion that the limitations on amicus filings outlined by the Seventh Circuit in *National Organization for Women v. Scheidler*, 223 F.3d 615 (7th Cir. 2000), are applicable here.

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[4] The bulk of testimony in this case was submitted on paper, in accordance with the court's scheduling order and with the consent of the parties. While the court's order directed only that direct testimony be submitted in writing, the parties were permitted to designate deposition testimony in place of cross-examining the witnesses at trial. The live testimony at trial, therefore, consisted of cross-examination and redirect questioning of the parties' expert witnesses.

The ACLU has presented no unique information or perspective that can assist the court in this matter, and seeks only to make additional legal arguments on behalf of the United States, a more than adequately represented party. Accordingly, the court denies the ACLU's motion for leave to file an amicus curiae brief.

B. Standing of Jones Intervenors

The State of Georgia has challenged intervenors' standing to contest the reapportionment plans. In the context of a Section 2 challenge, the Supreme Court has stated that "where a plaintiff resides in a racially gerrymandered district, . . . the plaintiff has been denied equal treatment because of the legislature's reliance on racial criteria, and therefore has standing to challenge the legislature's action." *United States v. Hays*, 515 U.S. 737, 744-45, 115 S. Ct. 2431, 132 L. Ed. 2d 635 (1995).

The State argues that two of the four individual intervenors reside in a benchmark Senate District disputed by the parties, but would be removed from this District under the Senate redistricting plan. Nevertheless, whether intervenors reside in the proposed or benchmark districts at issue in this matter does not affect their standing for purposes of challenging the redistricting plans as retrogressive. The plans are statewide and the drawing of one district's boundaries necessarily affects neighboring districts. Furthermore, the removal of intervenors from a majority-minority district is sufficient to provide intervenors with standing to challenge the proposed district.

The State also raises concerns that intervenors' interests in the litigation may diverge from the statements of counsel. Two of the intervenors appeared to testify at their depositions that they would prefer to reside in a majority-white, Republican district. This conflicts with their counsel's representations that intervenors are harmed by a decrease in

overall minority voting strength caused by reductions of minority population in the districts. However, we are reluctant to strike intervenors solely on the basis of this alleged contradiction. Intervenors' sworn declarations clearly allege an injury caused by diminution of minority voting strength. Deposition testimony may cast doubt on the extent of that injury, but it does not eliminate intervenors' standing.

C. King Motion for Reconsideration of Motion to Intervene

Pending before the court are two motions filed by putative intervenor, Michael B. King. King is an African American attorney and registered voter who resides in Georgia Senate District 44. King is proceeding pro se and first sought to intervene on December 19, 2001.[5] On December 21, 2001, King's motion was denied without prejudice because the United States had not yet identified its position with respect to the redistricting plans in question and the court was unable to determine whether King's interests would be adequately represented by the existing parties. *See* Fed. R. Civ. P. 24(a). However, King was granted permission to file an amicus curiae brief by no later than January 14, 2002.[6] Chambers

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[5] The court is acutely aware of its responsibilities to pro se litigants. *See, e.g., Fox v. Strickland*, 267 U.S. App. D.C. 84, 837 F.2d 507 (D.C. Cir. 1998) (requiring courts to inform pro se plaintiffs of standard of review for summary judgment motions). Despite the fact that Mr. King is an attorney, this court has taken care to ensure that King was aware of the progress of this case.

The court contacted King upon receipt of his motion to intervene and directed him to file his motion in accordance with the local rule governing three-judge courts, which requires that parties file all pleadings in quadruplicate. *See* Local Civil Rule 9.1.

[6] To date, King has not filed or attempted to file an amicus curiae brief.

manually faxed King a copy of the court's December 21, 2001 order.[7]

An initial scheduling and pretrial order in this matter was issued on December 20, 2001. This order set forth a series of deadlines designed to expedite trial proceedings. In particular, the order required defendants to identify their position with respect to the redistricting plans by no later than December 31, 2001. Chambers manually faxed a copy of the initial scheduling and pretrial order to King, in light of the expedited nature of the proceedings, King's failure to subscribe to the automated faxing program of the Clerk's office and his representation to chambers' staff that he had not viewed the filings in this case.

On January 15, 2002, King filed a renewed motion to intervene. On January 16, 2002, this court issued a scheduling order directing the parties to file any and all responses to King's motion by no later than January 17, 2002 at noon, and ordering that any and all replies be filed by no later than January 18, 2002 at noon. Also on January 16, 2002, chambers contacted the parties in this matter and attempted to contact King in order to inform them of the contents of the court's order. Counsel for the parties indicated that they had not received a copy of King's renewed motion to intervene. King's telephone answering system was full on January 16 and on the following two days. In light of these circumstances, chambers faxed a copy of the scheduling

[7] Chambers faxed King a copy of the order because at no point did King subscribe to the court's automatic faxing program, which allows parties to automatically receive facsimile copies of court orders at the time they are docketed. Counsel for plaintiff, federal defendants and intervenors all participate in the Court's automatic faxing program and receive facsimile copies of all orders docketed in this case.

order to King on January 16, 2002, and faxed a copy of King's renewed motion to plaintiff's counsel for distribution to all parties.[8]

On the evening of January 18, 2002, King contacted chambers and stated that he had received the facsimile copy of the January 16, 2002 order. He noted that the deadline for his submission had passed and indicated that he had just received the order. At no future date did King file any reply to the parties' responses to his motion to intervene.

As is evident from our initial scheduling and pretrial order, this matter was scheduled to proceed to trial on February 1, 2002. Pretrial statements, expert reports and direct testimony were all filed by January 18, 2002, and the pretrial conference was scheduled for January 25, 2002. On January 23, 2002, the court issued an order rescheduling the pretrial conference from 10:00 a.m. to 12:00 p.m. on January 25, 2002, and faxed King a copy of this order. King did not appear at the pretrial conference, nor did he communicate in any way with chambers concerning the expedited schedule for this matter. On January 30, 2002, this court denied King's motion to intervene without prejudice. This denial was based on King's "failure to appear at the January 25, 2002 pretrial conference, of which he had notice, his consistent failure to communicate

[8] Footnote 1 of Plaintiff's Memorandum of Points and Authorities in Opposition to King's Renewed Motion to Intervene, filed January 17, 2002, reflects these events:

> Although Mr. King's Certificate of Service indicates he mailed his "Renewed Motion to Intervene" by mail to only two of the attorneys (only D.C. counsel and no Atlanta counsel) in this case on January 14, 2002, the undersigned counsel represents that as of the close of business on January 16, 2002, none of the counsel in this case received Mr. King's papers. The undersigned obtained a copy of Mr. King's Renewed Motion via fax from the Court's law clerk on January 16, 2002, and immediately faxed copies to other counsel in this case.

with Chambers and with counsel for the parties in this matter, and the expedited nature of these proceedings." Order, Civil Action No. 01-2111, Jan. 30, 2002.

King sought to intervene as a matter of right pursuant to Fed. R. Civ. P. 24(a). However, any application for intervention must be timely. *See NAACP v. New York*, 413 U.S. 345, 93 S. Ct. 2591, 37 L. Ed. 2d 648 (1973) ("NAACP"). In *NAACP*, the Supreme Court discussed the legal standard for considering the timeliness of a motion to intervene in an action for declaratory judgment brought pursuant to Section 4(a) of the Voting Rights Act. 413 U.S. at 365-66. The Court held that the three-judge court properly exercised its discretion in determining from all of the circumstances that a motion to intervene was untimely. *Id.* ("Although the point to which the suit has progressed is one factor in the determination of timeliness, it is not solely dispositive. Timeliness is to be determined from all the circumstances."). King "failed to protect [his] interest in a timely fashion" by repeatedly failing to communicate with the court, to keep apprized of the case and to comply with local filing requirements. *Id.* 413 U.S. at 367. King knew or should have known that the proceedings were subject to expedited review.

King's legal interest has not been adversely affected by the Court's denial of his motion to intervene. *Id.* 413 U.S. at 368 (considering ability of movant to take future action to protect interests). This court's denial of King's motion to intervene in no way forecloses his ability to challenge Georgia's senate reapportionment plan. We have consistently stressed the expedited nature of our review of this matter. In denying King's renewed motion to intervene, the court was mindful of the fact that King's failure to act in a timely matter had "the potential for seriously disrupting the State's electoral process." *Id.* 413 U.S. at 369 (discussing Section 4 proceedings).

On February 7, 2002, King filed a motion to stay proceedings in this court, a motion for reconsideration of his motion to intervene, and a notice of appeal to the Supreme Court. The motion for a stay referred to a "January 4, 2002 hearing," which King moved to stay pending the court's consideration of his motion for reconsideration and his appeal. No hearing was scheduled in this matter on January 4, 2002. The court commenced trial in this case on February 4, 2002 and it is possible that King intended to request a stay of the trial. Nevertheless, the motion was filed on February 7, 2002, the last day of the four-day trial.

Plaintiff argues that, upon receipt of the notice of appeal, this court lost jurisdiction to consider King's motions. We agree. The Supreme Court has provided clear direction as to how to proceed when a defendant simultaneously files a notice of appeal with the appellate court and a motion for reconsideration with the district court. "The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the [appellate court] and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58, 103 S. Ct. 400, 74 L. Ed. 2d 225 (1982); accord *United States v. DeFries*, 327 U.S. App. D.C. 181, 129 F.3d 1293 (D.C. Cir. 1997). While it is clear to the court that King's renewed motion to intervene and motion to stay are as untimely as his previous motion, King's notice of appeal divested this court of jurisdiction to consider King's motions.

D. Motion to Exclude Dr. Epstein's Testimony

The United States and intervenors seek to exclude the testimony of the State's expert, Dr. David Epstein, regarding his analysis of white crossover voting in the benchmark Senate Districts, *see* U.S. Ex. 122, and his conclusion that it was proper to assess voting trends on a statewide, rather than a regional basis. Although the testimony was provided at the eleventh hour to the United States, the United States was able

to cross-examine Epstein with respect to his analysis. The cross-examination of Epstein effectively highlighted problems with Epstein's conclusion that there was no statistically significant variation in the degree of white crossover. Furthermore, the court offered the United States an opportunity to re-open cross-examination in order to permit the United States' expert to assist counsel in the cross-examination. The United States declined this opportunity. The court finds that the introduction of Epstein's calculations of white crossover voting are not unduly prejudicial. Epstein relies on the table in question only for the limited conclusion that a statewide probit analysis was proper; neither he nor the State suggests that the table is reliable evidence of white crossover voting in the Senate Districts.

Intervenors urge this court to strike Epstein's testimony on the basis that it is not competent expert testimony. They argue that Epstein's probit analysis does not represent reliable or relevant evidence. However, Epstein testified that probit analysis is a standard statistical methodology. The court finds that Epstein's report is reliable and relevant evidence.

II. Findings of Fact

At first glance, the evidentiary record in this matter appears extensive. Yet, considering that the State has chosen to present three statewide reapportionment plans to the court, the record in fact is rather slim. The State of Georgia, the United States and intervenors have all contributed to the evidentiary record before the court. The State introduced statistical data on the existing and proposed districts, including political performance, total population and voting age populations, as well as break-downs of that data by race. The State relied on the testimony of two expert witnesses, State legislators, United States Representative John Lewis from Georgia, and the director of the redistricting office in Georgia, Linda Meggers. In response, the United States presented the court

with a greater amount of and more detailed evidence, including voter registration data, precinct-level information, data and maps demonstrating exactly how district lines would be redrawn by the proposed plans, and testimony of numerous social leaders and local elected officials from the contested districts. The United States also provided the only expert report that considered the prevalence of racially polarized voting. But the United States' evidence was extremely limited in scope-focusing only on three contested districts in the State Senate plan. That evidence was not designed to permit the court to assess the overall impact of each of the three plans. Finally, while intervenors challenged all three plans, they present little evidence other than proposed alternative plans and an expert report critiquing the State's expert report.

A. Reapportionment and Elections in Georgia: Background

The Georgia General Assembly has plenary authority under the Constitution and laws of the State of Georgia to enact, subject to the approval or veto of the Governor, legislation to reapportion the State Senate and House of Representatives, as well as of Georgia's designated number of seats in the U.S. House of Representatives. Ga. Const., Art. III, § II, P II; §§ O.C.G.A. 21-2-3, 21-2-4, 28-2-1; 28-2-2. In fact, Georgia's State Constitution mandates that the General Assembly reapportion the Senate and the House of Representatives as necessary after each United States decennial census. Georgia Const., Art. III, § II, P 2. The State Constitution further provides that the districts shall be composed of contiguous territory. *Id.*

The current United States Congressional districts are the result of a court-drawn remedial map, which was put in place after a legislative impasse and a court decision that two Congressional districts were unconstitutionally based on race

in the effort to increase their minority population percentages. *Abrams v. Johnson*, 521 U.S. 74, 138 L. Ed. 2d 285, 117 S. Ct. 1925 (1997). This court-drawn remedial map is the benchmark plan [9] for this court's consideration of plaintiff's complaint for declaratory judgment. Pl.'s Proposed Findings of Fact & Conclusions of Law ("PPFF") P 53.

The current State House and State Senate plans were put in place as a result of a mediated plan, which was adopted by the Georgia General Assembly in 1997. *Johnson v. Miller*, 929 F. Supp. at 1561-67; PPFF P 68. Pursuant to a settlement agreement in a section 5 lawsuit, both of the current plans were submitted to the Department of Justice and were precleared on April 29, 1997. *See* DOJ File No. 95-3656 (granted as reconsideration of original 1995 submission); PPFF P 68. Since the adoption of the Senate plan in 1997, it has been amended with minor changes three times and those amendments were precleared by the U.S. Department of Justice on April 23, 1998 (DOJ File No. 98-98-0759 and 98-0912), September 20, 1999 (DOJ File No. 1999-0989) and August 28, 2000 (DOJ File No. 2000-2682). *Id.* P 69. Since the adoption of the House plan in 1997, it has been amended once. *Id.* That change was precleared by the U.S. Department of Justice on April 23, 1998 (DOJ File No. 98-0759 and 98-0912). *Id.* The 1997 plans, as amended, constitute the benchmark plans for the State House and State Senate redistricting plans submitted to the court for consideration.

Following the 2000 national census, the Georgia legislature enacted redistricting plans. These plans are intended to take effect by the time of the next general election day, scheduled for Tuesday, November 5, 2002, at which time Georgia voters will elect candidates to the United States Congress and the Georgia General Assembly. O.C.G.A. § 21-2-9; PPFF P 16.

[9] The benchmark plan is the existing districting plan in effect, or the last legally enforceable plan.

In the upcoming election cycle for Congress and the Georgia General Assembly, candidates for partisan offices will qualify for either the Democratic Party or Republican Party nomination between 9:00 a.m. on June 19, 2002 and 12:00 p.m. on June 21, 2002. O.C.G.A. § 21-2-153(c)(1); PPFF P 13. The primary for nomination to partisan office in Georgia will next be held on August 20, 2002. O.C.G.A. § 21-2-150(b)(1); PPFF P 14. Any run-off election necessary after the August 20 primary election will be held on Tuesday, September 10, 2002. O.C.G.A. § 21-2-501(g); PPFF P 15.

In Georgia, a candidate seeking nomination to a state or federal office in a regular partisan primary must receive a majority of the votes cast in the primary or in the primary run-off election. O.C.G.A. § 21-2-501(a); PPFF P 18. A candidate is elected to office in a regular general election upon receipt of a 45% plurality vote. O.C.G.A. §§ 21-2-501(g), 21-2-2(22); *Id.* P 19. In the event no candidate receives such a plurality, a runoff election is then held 21 days later. *Id.*

B. Georgia Demographics

The 1990 census showed that the total population of the State of Georgia was 6,478,216 persons. PPFF P 21. The 1990 census also showed that 1,746,565 persons in Georgia, or 26.96%, identified themselves as black.[10] *Id.* P 22. 1,737,165 persons, or 26.82% identified themselves as non-Hispanic and black only. *Id.* The 1990 census reflected that black voting age population ("BVAP") was 1,168,142, or 24.58% of the total voting age population ("VAP") in the

[10] It appears from the 1990 and 2000 census reports provided by the parties that the census asked respondents to identify themselves as "black." Thus, while we refer to "African American" individuals and voters throughout the opinion, this section will use "black" to identify individuals' responses to the census.

state. *Id.* PP 25, 26. The total VAP of non-Hispanic individuals identifying themselves as black only was 24.46% of the total VAP. *Id.* P 26.

The 2000 decennial census shows that the total population of the State of Georgia has increased by 1,708,237 individuals since 1990, and is now 8,186,453. PPFF P 27. There are 6,017,219 people in Georgia who are of voting age. *Id.* P 31.

The 2000 census allowed individuals for the first time to identify themselves as more than one race. As a result of this change, the parties dispute the proper calculation of the African American population of Georgia. In the 2001 special redistricting session, the State of Georgia defined "black" as including non-Hispanic and Hispanic black persons of a single race, and "black combo" as all persons who identified themselves as black in combination with any other racial or ethnic category on the 2000 census form. U.S. Ex. 702, 18:13-24. Consequently, for purposes of this matter, Georgia has counted its black population as including all black multiracial Hispanic and non-Hispanic responses. In contrast, the Department of Justice, in accordance with a Guidance issued by the Department in January, 2001, has counted as black those non-Hispanic individuals who identify as black only, or as black and white, but not individuals who identified as black and another minority race. *See* Guidance Concerning Redistricting and Retrogression Under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, 66 Fed. Reg. 5,411 (Jan. 18, 2001).[11]

Total Population

The 2000 census showed that 2,349,542 residents of Georgia identified themselves as black only, representing 28.7% of the total state population. PPFF P 27. The total non-

[11] The court will refer to Georgia's method of counting BVAP as "BVAP (Ga.)", and to the United States' as "BVAP (U.S.)".

Hispanic population identifying themselves as black only represents 28.5% of the total state population. *Id.* 0.22% of the total population identified themselves as black and white only, and 0.21% of the total population identified themselves as non-Hispanic and black and white only. *Id.*

The total population of Georgia identifying as black and only one other racial category was 0.47% of the total population; and 0.20% of the population identified as black and one other non-white racial category. *Id.* P 29. An additional 0.07% of the total population identified as black and more than one other racial category. *Id.* P 30.

Total Voting Age Population

The total voting age population ("VAP") of Georgia identifying themselves as black only was 1,602,985 people, or 26.64% of the total VAP. *Id.* P 32. The voting age population of non-Hispanic individuals identifying themselves as black only is 26.52% of the total VAP. U.S. Proposed Findings of Fact & Conclusions of Law ("USPFF") P 124.[12] The VAP identifying as black and white represents 0.08% of the VAP; the total non-Hispanic black and white VAP is 0.07% of the total. PPFF P 34. Those identifying themselves as black and one other racial category constitute 0.28% of the VAP, *id.* P 35, while those identifying themselves as non-Hispanic black and one other racial category comprise 0.25% of the VAP. *Id.* Those identifying themselves as black and more than one other racial category represent 0.05% of the VAP. *Id.* P 36.

Registered voters may identify their race when they register to vote. However, unlike the 2000 census, voters are not

[12] Plaintiff admitted this finding of fact, PPFF P 33; however, in plaintiff's own findings of fact, it states in a footnote that it believes the proper number of census responses for non-Hispanic VAP in Georgia is 1,591,421, or 26.44%. PPFF P 32, n.6; but see id. n.7 (suggesting that proper percentages is 27.83%).

permitted to identify as more than one race. At the time of the November 1992 general election there were 3,177,061 people registered to vote in Georgia; of these, 698,305 people, or 21.97%, identified themselves as black. *Id.* P 37. In November 1994, 3,003,527 people were registered to vote in Georgia, 21.92% of whom identified as black. *Id.* P 38. In November 1996, 24.38% of persons registered to vote identified themselves as black, *id.* P 39, and, in November 1998, 24.73% of persons registered to vote identified as black. *Id.* P 40. At the time of the November 2000 general election, 3, 856,676 persons registered to vote in Georgia, of which 980,587, or 25.42%, identified themselves as black. *Id.* P 41.

C. The 2001 Reapportionment Process

During the 2001-02 session of the General Assembly, there were 180 seats in the Georgia House of Representatives and 56 seats in the Georgia Senate. During the 2001-02 session of the Georgia General Assembly, 34 of the 180 Representatives and 11 of the 56 Senators were African American. All of the African American Representatives and Senators are Democrats. Eric Johnson dep. at 17:13-16; Lynn Westmoreland dep. at 17:18-24.

On March 22, 2000, the results of the 2000 decennial census for Georgia became generally available from the Census Bureau, prompting the General Assembly to act. PPFF P 70. The Senate formed a committee to address the issues of reapportionment.[13] During the 2001-02 session, the chairman, vice-chairman and secretary of the Senate Reapportionment Committee were Senators Tim Golden, Robert Brown and Hugh Gillis respectively. *Id.* at P 6. During the

[13] The official legislative website for the 2001 redistricting process by the Georgia General Assembly is http://www.legis.state.ga.us/Legis/2001_02/reapp/index.htm. PPFF P 72.

2001-02 session of the General Assembly, that Committee had 24 members, six of whom were African American. *Id.* at P 7. Those six were Vice-Chairman Robert Brown of the 26th district, Senator Ed Harbison of the 15th, Senator David Scott of the 36th, Senator Nadine Thomas of the 10th, Senator Regina Thomas of the 2nd and Majority Leader Charles Walker of the 22nd. *Id.*

The House of Representatives also formed a committee to address the issues of reapportionment. The chairman, vice-chairman and secretary of the House Legislative and Congressional Reapportionment Committee were Representatives Tommy Smith, Jay Shaw and Carl Von Epps, respectively. *Id.* P 8. During the 2001-02 session of the General Assembly, the House Reapportionment Committee has 29 members, six of whom were African American. *Id.* P 9. Those six were Carl Von Epps of the 131st district, the Secretary of the Reapportionment Committee and Chairman of the Legislative Black Caucus, David Lucas of the 124th, Lester Jackson of the 148th, Arnold Ragas of the 64th, Kasim Reed of the 52nd, and LaNett Stanley-Turner of the 50th. *Id.*

Prior to the 2001 special sessions to consider reapportionment issues, the House and Senate Reapportionment Committees held joint hearings as follows: April 17—Watkinsville; April 18—Atlanta; April 25—Augusta; April 30—Perry; May 10—Brunswick; May 15—Valdosta; May 23—Dahlonega.*Id.* P 71.[14]

Also prior to the 2001 special session, the House and Senate Reapportionment Committees adopted guidelines providing for public access to committee hearings and meetings,

[14] Intervenors object that these were not "hearings" but otherwise do not contest the dates and locations. Intervenors' Pretrial Proposed Findings of Fact & Conclusions of Law P 116.

public access to redistricting data and materials and general guidelines for the presentation and introduction of plans to the committees. *Id.* P 72.

The Senate Reapportionment Committee met formally on April 12, June 28, July 12, August 1, August 6, August 9, August 27, August 28, September 4, September 7 and September 13, 2001. *Id.* P 73. Transcripts or records of those proceedings were provided to the Department of Justice as a part of this litigation. *Id.* The House Legislative and Congressional Reapportionment Committee met on April 11, June 29, July 10, July 20, July 24, July 26, July 31, August 13, August 14, August 16, August 22, August 28, August 29, September 4 and September 10. *Id.* Transcripts or records of those proceedings were provided to the Department of Justice. *Id.*

On June 21, 2001, Governor Roy Barnes issued a proclamation calling the General Assembly into special session for purposes of reapportioning the State Senate and House of Representatives.[15] *Id.* P 74. This first special session of the General Assembly began on August 1 and ended on August 17, 2001. *Id.*

Linda Meggers has worked with Georgia's Legislative Redistricting Office since 1971. *Id.* P 76. She worked full-time with the office since 1973, and has served as the

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[15] Regular sessions of the Georgia General Assembly commence on the second Monday in January of each year and may continue in session for a period of no longer than 40 legislative days. Ga. Const., Art. III, § IV, P I; PPFF P 10. The Governor of Georgia may convene the General Assembly in special session by proclamation and the only laws that may be enacted during such a special session are those that relate to the purposes stated in the proclamation or in any other amendment thereto. Ga. Const., Art. V, § II, P VII(a); PPFF P 11. Special sessions of the General Assembly are limited to a period of 40 legislative days unless extended in accordance with the Georgia Constitution. Ga. Const., Art. V, § II, P VII(c); PPFF P 12.

Director since 1978. *Id.* She is intimately familiar with the demographics, changing demographics, and political geography of the entire state. Pl. Ex. 22 at 10-16. Meggers provided direct testimony, and she was twice deposed by the United States.

Ms. Meggers gave an overview of the 2001 reapportionment process, testifying that there were significant differences in this redistricting process compared with past years. *Id.* The data and technology available in 2001 allowed for sophisticated analysis of the political performance of prospective districts:

> Political geography is exactly what we are talking about here, new Senate districts, congressional districts, House districts; that's political geography. So we could draw a proposed House district, House piece of geography, and have the census data, and immediately analyze it politically. If that district had existed in 1996 or 1998, this is how it would have voted in these particular elections, where we had the data.

Id. at 9. Data was available to assess whether districts tended to vote for Democrats or Republicans in past elections. *Id.* Ms. Meggers testified that, in contrast to past elections, political performance data was used extensively in the 2000 redistricting process. *Id.* at 17.

The State Senate redistricting plan before this court was approved by the Georgia Senate on August 10, 2001, and by the Georgia House of Representatives on August 17, 2001. The State House redistricting plan was passed by the Georgia House of Representatives on August 29, 2001 and by the Georgia Senate on September 6, 2001. The Congressional redistricting plan was passed by both houses of the Georgia General Assembly on September 28, 2001. No Republicans in either the House or Senate voted for any of these reapportionment plans. (Eric Johnson dep. at 27). All of the African American legislators in the Georgia General Assem-

bly are Democrats, PPFF P 5. With the exception of one African American Representative and one African American Senator who voted against the State House and State Senate redistricting plans, African American legislators voted for the redistricting plans.

Ms. Meggers testified that the goal of the Democratic leadership in the Senate and House was two-fold:

> To maintain the number of minority districts that we presently had, but at the same time maintain and increase the number of Democratic seats that they had in the House and the Senate. They knew that they couldn't just maintain what they had, they actually needed to strengthen those majorities if they were to maintain a majority over the decade. When I say Democratic leadership, you need to understand that the Black Caucus members and the Black Caucus leadership were very involved in that. They are very much a part of the leadership when we talk about this. So, they wanted to maintain those districts, but not waste, is the—I guess the term I heard often, waste their votes.

Pl. Ex. 22 at 20-21. One of the reasons given by African American senators for aligning their interests with those of the Democratic Party was that, should the Democratic Party cease to be in the majority in the State House and State Senate, all existing African American chairs of committees would be lost. C. Walker dep. at 94. Senator Robert Brown, an African American from Senate District 26, was Vice Chairman of the Senate Reapportionment Committee overall, and was the chairperson of the subcommittee that did the Senate Plan itself. Pl. Ex. 20 at 23. According to Senator Brown, there are 11 African Americans in the state Senate, and 7 to 8 of that number currently could chair committees. *Id.* at 18-24. The majority leader of the Senate is an African American, and the chairman of the rules committee, Senator Brown, is also African American. *Id.*

D. United States Congressional Redistricting

After each decennial census, the United States House of Representatives is reapportioned to reflect population changes in the states. After the 1990 census, the State of Georgia was assigned 11 seats pursuant to that reapportionment. PPFF P 101; Pl. Exs. 8A, 8C. The State of Georgia then had the responsibility to redistrict to reflect those 11 seats. As discussed above, that redistricting was subject to litigation that resulted in a court-ordered redistricting plan. *Abrams v. Johnson*, 521 U.S. at 82-85. The court-ordered plan that resulted from that litigation is the benchmark plan before this court. PPFF P 102.

Following the 2000 census, Georgia was apportioned 13 seats in the United States House of Representatives. *Id.* PPFF P109. A Conference Committee of the Georgia House of Representatives and Senate produced the Congressional redistricting plan submitted to this court for preclearance. Pl. Ex. 20 at 28 (Brown test.). The Conference Committee had six members, three from the Senate and three from the House of Representatives. Of these six, two Senators and one Representative are African American. *Id.* at 27.

1. The Benchmark Plan

According to the 2000 census results, the percentages of black population ("BPOP"), black voting age population ("BVAP"), and black registration ("BREG") for each of Georgia's existing Congressional districts under the benchmark plan are as follows:

	%BPOP	%BVAP(Ga.) [16]	%BREG
District 1	31.65	28.97	26.23
District 2	40.85	37.38	35.68
District 3	31.27	28.62	26.69
District 4	50.60	46.24	49.13
District 5	63.57	58.85	60.31
District 6	11.39	10.80	9.23
District 7	18.66	16.88	15.99
District 8	32.66	30.28	27.65
District 9	3.40	3.12	2.53
District 10	39.00	36.12	33.72
District 11	15.01	13.64	12.1

Pl. Exs. 8D, 8E. In the current Congressional plan, there are two districts with over 50% total black population, the Fourth and Fifth Districts, but only one district, the Fifth District, with over 50% BVAP and black voter registration. *Id.* However, the Fourth District, has over 45% BVAP and black voter registration. *Id.*

Notwithstanding the fact that the Fifth Congressional District is the only existing majority African American district in terms of voting age population and registered voters, the State of Georgia is currently represented by three African American Congresspersons: Sanford Bishop (Second District), Cynthia McKinney (Fourth District) and John Lewis (Fifth District). Pl. Ex. 21 at 2; Tr., 2/4/02, p.m. at 59-61.

Congressman John Lewis currently represents Georgia's Fifth Congressional District in the United States House of Representatives. Pl. Ex. 21 at 2:5-6. Congressman Lewis has been one of this country's leading civil rights advocates for

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[16] These percentages reflect BVAP, as calculated by the State of Georgia.

the past 50 years, and his actions, along with those of Dr. Martin Luther King, Jr., were instrumental in achieving passage of the Voting Rights Act of 1965. *Id.* at 3, 12.

Cynthia McKinney, the current African American Congresswoman for the Fourth Congressional District, was first elected in 1994 in the Eleventh Congressional District when the BVAP of that district was 60%. Tr., 2/4/02, p.m. at 61. Based upon the remedial map drawn by the three-judge court, *see Abrams v. Johnson*, 521 U.S. at 83-85, Ms. McKinney ran for election in the Fourth Congressional District, and was successful in 1996, 1998, and 2000 when the BVAP of the district was 33%, 39% and 45%, respectively. Pl. Ex. 25, App.; PPFF P 107.

Sanford Bishop, the current African American Congressman for the Second Congressional District, was first elected in a district in which the total BVAP was 52%. Tr., 2/4/02, p.m. at 59-60. Following the redrawing of those district lines by the federal court in 1996, Congressman Bishop won reelection in the Second District when the total BVAP was between 35% and 37%. Pl. Ex. 25, App. In the course of his political career, Congressman Bishop has won reelection to Congress on three separate occasions in a rural majority-white district. PPFF P 108.

By virtue of the reapportionment mandated by the 2000 census results, the State of Georgia's representation in the United States House of Representatives was increased to 13 seats. *Id.* [PPFF] P 109. Based upon a total statewide population of 8,186,453 people, and the assignment of 13 seats in the United State House of Representatives for the State of Georgia, the ideal size of a Congressional district for purposes of adherence to the principle of one person, one vote is 629,727 people. *Id.* [PPFF] P 110.

Based upon the population statistics reported in the 2000 census, all of Georgia's existing 11 congressional districts have populations larger than the ideal district size of 629,727,

and are thus out of apportionment. The percentages by which the current districts exceed the ideal district size are as follows:

District 1:	9.92%
District 2:	3.28%
District 3:	24.13%
District 4:	18.33%
District 5:	2.82%
District 6:	49.51%
District 7:	19.44%
District 8:	5.25%
District 9:	29.32%
District 10:	5.16%
District 11:	32.82%

Id. [PPFF] P 111.

2. The Proposed Plan

During its second special session, the Georgia General Assembly enacted Senate Bill 1EX2, which set forth the reapportionment plan for Georgia's 13 new congressional districts. *See* Pl. Ex. 9A; PPFF P 112. Senate Bill 1EX2 was adopted by the Georgia State Senate on September 28, 2001, by a vote of 30 to 23. *Id.* P 114. No member of the Senate Legislative Black Caucus voted against the plan. *Id.* The bill was adopted by the Georgia House of Representatives on the same day, by a vote of 99 to 59. *Id.* P 113. No member of the House Legislative Black Caucus voted against the plan. *Id.* The Governor of Georgia signed Senate Bill 1EX2 into law on October 1, 2001, as Act No. 2EX11.*Id.* P 115.

Under the proposed Congressional redistricting plan, the total population ("TPOP") and voting age population ("TVAP") of each district is as follows:

	TPOP	TVAP
District 1	629,761	456,300
District 2	629,735	455,164
District 3	629,748	464,632
District 4	629,690	472,785
District 5	629,727	492,438
District 6	629,725	455,805
District 7	629,706	444,493
District 8	629,700	457,971
District 9	629,762	467,232
District 10	629,702	463,958
District 11	629,698	465,459
District 12	629,735	470,201
District 13	629,732	450,756

Id. P 116.

Under the proposed Georgia Congressional plan, the percentages of black population ("BPOP"), BVAP, and black registration ("BREG") for each of the proposed Congressional districts are as follows:

	%BPOP	%BVAP(Ga.) [17]	%BREG
District 1	23.21	21.04	18.62
District 2	45.22	41.45	39.99
District 3	40.32	37.55	34.97
District 4	54.69	50.02	51.16
District 5	56.92	52.04	53.36
District 6	7.36	6.87	6.27
District 7	7.43	6.81	6.02
District 8	12.95	12.07	10.37
District 9	14.07	12.99	11.16
District 10	3.65	3.36	2.89
District 11	29.10	26.36	26.14
District 12	43.19	39.00	39.10
District 13	41.97	38.22	41.57

Pl. Exs. 9C, 9D.

Under the proposed Congressional redistricting plan, there are still two Congressional districts, the Fourth and Fifth, with majority black populations, but the number of Congressional districts with over 50% BVAP (Ga.) and black voter registration has increased from one, the Fifth, to two, the Fourth and Fifth. *Id.* However, as intervenors emphasize, according to the United States' calculations of BVAP, there is one district with a majority BVAP-the Fifth District-in both the benchmark and proposed Congressional plans. *See* Br. of Amicus Curiae/Defendant-Intervenors, Jan. 14, 2002, at 26.

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[17] For purposes of this table, we use BVAP as calculated by the State of Georgia.

The proposed plan would also create additional districts with significant African American populations: (1) the proposed Second Congressional District has a BVAP in excess of 40% and a black voter registration of nearly 40%; (2) the proposed Thirteenth Congressional District has black voter registration of over 40%; and (3) the Third and Twelfth Congressional Districts have black populations of over 40% and significant BVAP and black voter registrations. Pl. Exs. 9C, 9D. Several African American candidates have announced their intentions to run for the new 12th and 13th Congressional districts. Tate dep. at 107:11-18.

The State presented an analysis of the statewide election returns in four elections between an African American candidate and a white candidate held between 1998 and 2000. This analysis predicted that the voters of the proposed Fifth Congressional District would have supported African American candidates by an estimated 68.97% in a Democratic primary, and by 70.83%-75.65% in the general elections. Pl. Exs. 9D, 10B.

The State did not introduce expert testimony interpreting the significance of these percentages. Furthermore, the court heard no expert testimony regarding the existence of racially polarized voting patterns in any of the benchmark or proposed Congressional Districts, or on the impact of such patterns on the ability of minority candidates to win election. Intervenor-defendant Patrick L. Jones testified that he "believes" that it is "difficult, if not impossible" for minority candidates of choice to be elected in districts of less than 55% BVAP, and that it will be difficult to elect a candidate of choice in the Fifth Congressional District. Int. Ex. 27.

Intervenors have submitted alternative plans, some of which would increase BVAPs in majority-minority districts. See Int. Exs. 20-22. However, the three alternative plans

submitted by intervenors create at most two Congressional districts with BVAP majorities. None of the alternative plans place Republican incumbents in the same district.

E. State House Redistricting

The Georgia Constitution mandates that the Georgia House of Representatives consist of not fewer than 180 members apportioned among districts of the State of Georgia. Ga. Const., Art. III, § II, P I(b); O.C.G.A. § 28-2-1; PPFF P 135. Members of the Georgia House of Representatives are elected for two-year terms and serve until the time of the convening of the next General Assembly. Ga. Const., Art. III, § II, P V(a); PPFF P 136. Members of the Georgia House of Representatives are elected at the same time as the Governor. Ga. Const., Art. V, § I, P II; PPFF P 137.

1. The Benchmark Plan

The benchmark plan for the Georgia House of Representatives contains 180 single-member districts. PPFF P 140; Pl. Exs. 11A, 11C. Based upon a total population of 8,186,453 people and the existence of 180 members of the Georgia House of Representatives, the ideal size of a State House district for one person, one vote purposes is 45,480 people. Pl Ex. 12C at 8; PPFF P 142.

According to the 2000 census population statistics, there are 40 districts in the benchmark plan in which the total non-Hispanic black population is over 50%.[18] *Id.* P 143. In addition, there are 37 districts in the benchmark plan in which the total BVAP is over 50%.[19] *Id.* P 144. This is true whether

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[18] These are benchmark House Districts 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 64, 65, 66, 68, 69, 70, 71, 72, 73, 75, 93, 96, 116, 117, 118, 120, 121, 124, 127, 131, 133, 134, 136, 140, 148, 149, 151, 161 and 162. Pl. Ex. 11D; PPFF P 143.

[19] These are benchmark House Districts 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 64, 65, 66, 68, 69, 70, 71, 72, 73, 93, 116, 117, 118, 120, 121,

BVAP is calculated according to the Attorney General's Guidance or by Georgia's methodology. Finally, under the benchmark plan, there are 38 districts in which the total black voter registration is over 50%.[20] Pl. Ex. 11E.

Georgia's House districts have traditionally been drawn with a deviation of plus or minus five percent from the ideal district size. PPFF P 146. According to the 2000 census results, only two of the existing House districts with a total black population, total BVAP, or black voter registration over 50%, fall within that traditional deviation requirement. *Id.*; Pl. Exs. 11D, 11E. All but five of the 37 majority BVAP districts were between -7.23% and -31.92% in deviation from the ideal district size, indicating they were significantly underpopulated. *Id.*

2. The Proposed Plan

In its first special session, the Georgia General Assembly passed a redistricting plan for the State House that was not signed by the Governor. James dep. at 89: 4-12; Int. Ex. 31 at 3-4 (Westmoreland Decl.). After the passage of the first House plan, Senator Vincent Fort, who is African American, called for a meeting of the Georgia Legislative Black Caucus ("GLBC"). In an August 24, 2001 letter addressed to Representative Carl Von Epps, Chairman of the Caucus, Senator Fort stated:

> We are concerned that the GLBC has not been involved in the redistricting process almost at all. This has

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124, 127, 133, 134, 136, 140, 148, 149, 151, 161, and 162. Pl. Ex. 11D; PPFF P 144.

[20] These are benchmark House Districts 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 64, 65, 66, 68, 69, 70, 71, 72, 73, 75, 93, 96, 116, 117, 118, 120, 124, 127, 133, 134, 136, 140, 148, 149, 158, 161, and 162. Pl Ex. 11E.

> resulted, among other things, in a legislative plan passing that has diluted majority-minority districts in both the House and the Senate.

Int. Ex. 17. This letter contained the signatures of six members of the GLBC.*Id.*; U.S. Ex. 722, 51:23-52:16. Senator Fort either called or spoke to each member of the GLBC whose signature appears upon the letter, and each consented to signing the letter.*Id.* at 55:22-56:10; USPFF at P 64.

During its second special session, the Georgia General Assembly enacted House Bill 14EX2, which provided for the reapportionment of the Georgia House of Representatives. *See* Pl. Ex. 12A (identifying plan as "HSEPLN2"); PPFF P 147. House Bill 14EX2 was adopted by the Georgia House of Representatives on August 29, 2001, by a vote of 100 to 72. *Id.* P 148. The Senate passed the bill on September 6, 2001, by a vote of 29 to 22. *Id.* Representative Dorothy Pelote and Senator Regina Thomas, both of the Savannah area, were the only African American legislators who voted against the plan. *Id.* The Governor signed H.B. 14EX2 into law on October 1, 2001, as Act No. 2EX23. *Id.* P 149.

This proposed House plan contains 180 members allocated to 147 districts. Pl. Ex. 12C; PPFF P 150. 124 districts contain one member, 15 districts contain two members, six districts contain three members, and two districts contain four members. *Id.*

The proposed House plan contains 42 districts in which the total black population is over 50%. Pl. Ex. 12C.[21] The proposed House plan contains 39 seats in districts in which the total BVAP, pursuant to the State's interpretation of the

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[21] These are House Districts 43 (two-member district), 44, 45, 47, 48 (four-member district), 49, 50, 51, 55, 57, 58, 59 (three-member district), 60 (three-member district), 61 (three-member district), 62, 81, 83, 97, 98, 100, 103, 105, 107, 111, 113, 114, 124 (two-member district), 125, 128, 135, and 136. Pl. Ex. 12C.

census data, is over 50%.[22] Pl. Ex. 12C. When BVAP is calculated pursuant to the Attorney General's Guidance, the redistricting plan contains 38 House seats in which the BVAP is over 50%. U.S. Resp. to PPFF P 152. The proposed House plan contains 39 districts in which black voter registration is over 50%.[23] Pl. Ex. 12D.

Comparing the proposed plan to the benchmark plan, there are two additional districts with black populations of over 50%, and one additional district with black voter registration over 50%. Pl. Exs. 12C, 12D. Either one or two additional seats are created in districts with majority BVAPs, depending on whether the United States or Georgia's method of calculating BVAP is used. *Id.*; U.S. Resp. to PPFF P 152.

3. The Challenged Districts

Intervenors challenge the drawing of seven House districts, 51, 95, 97, 100, 113, 124, and 125, as well as the creation of multi-member districts. See Renewed Mot. to Intervene, Jan. 4, 2002. The alternative House reapportionment plans submitted by intervenors, and drawn by Republican House leader Lynn Westmoreland, place certain Democratic incumbents in the same districts to run against one another. *See*, e.g., Int. Ex. 31 at 36:19-37:18, 38:17-39:11, 44:4-25, 46:12-16; 48:11-16; 50:1-51:16, 53:2-54:18, 58:15-19, 59:5-60:2. None of Westmoreland's proposed alternative plans drew

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[22] These are House Districts 43 (two-member district), 44, 45, 47, 48 (four-member district), 49, 50, 51, 55, 57, 58, 59 (three-member district), 60 (three-member district), 61 (three-member district), 62, 81, 83, 97, 98, 100, 105, 107, 111, 113, 114, 124 (two-member district), 135 and 136. Pl. Ex. 12C.

[23] These are House Districts 43 (two-member district), 44, 45, 47, 48 (four-member district), 49, 50, 51, 55, 57, 58, 59 (three-member district), 60 (three-member district), 61 (three-member district), 62, 81, 83, 97, 98, 100, 105, 107, 111, 113, 114, 124 (two-member district), 135 and 136. Pl. Ex. 12D.

districts in which Republican incumbents were drawn within the same district. *Id.* at 43:3-8; 48:17-21; 51:17-23; 54:19-22; 62:17-22.

Intervenor Roielle Tyra objects to the loss of one majority-minority House district and resulting single district where two minority members are "pitted against each other." Int. Ex. 26. However, when reviewed as a whole, the proposed House plan creates four new opportunities for African Americans to elect candidates of their choice in open seats in House Districts 48, 59, and 61, and a new opportunity in House District 60. Pl. Exs. 12B, 12D.

a. Proposed House District 51

Proposed House District 51 is a single-member district located wholly within Fulton County, Georgia. Pl. Exs. 12B, 13A. The proposed district embraces territory formerly included in benchmark House District 56, which is also wholly within Fulton County. Pl. Ex. 11B.

In light of the 2000 census results, the ideal size for one of the 180 House seats is 45,480 persons. Thus, the benchmark House District 56 is 4,169 persons, or 9.17%, short of the ideal district size. Pl. Exs. 11D, 13B. Black voter registration levels, as compared to overall voter registration, have declined in benchmark House District 56 over the past three election cycles, from 58.91% in 1996, to 58.74% in 1998, and finally to 55.86% in 2000. Pl. Exs. 11E, 13B.

Voters within benchmark House District 56 tend to vote for Democratic Party candidates, as demonstrated by an overall Democratic performance score of 86.92%, as well as the Democratic performance numbers for the individual election

years of 1996 (80.25%), 1998 (82.14%) and 2000 (81.50%).[24] Pl. Exs. 11E, 13B.

In addition, 60.9% of the voters within the benchmark House District 56 voted for Michael Thurmond, an African American, over his white opponent in the 1998 Democratic Party primary runoff election for the open State Labor Commissioner seat. 88.43% of voters in benchmark House District 56 voted for Thurmond in his general election victory over a white Republican opponent. Pl. Exs. 11E, 13B. Additionally, voters within the benchmark House District 56 demonstrated electoral support for other African American Democratic candidates running for statewide office, voting in 1998 for Thurbert Baker for Attorney General at a rate of 82.21% and, in 2000, for David Burgess, a candidate for the Public Service Commission, at a rate of 79.23%. Pl. Exs. 11E, 13B.

The precincts included in the proposed House District 51 have supported Democratic candidates. According to past election results, the precincts that comprise proposed House District 51 have an overall Democratic performance score of 86.38%. Pl. Ex. 12D. Using 1996 election results, plaintiff has projected Democratic performance numbers of 80.38%, using 1998 election results, 81.82%, and using 2000 election results, 80.89%. Pl. Exs. 12D, 13B. Voters within the proposed district also supported Michael Thurmond in the 1998 primary runoff at a rate of 61.18%, and at 87.97% in his general election contest. *Id.* Additionally, 81.55% of these voters supported Thurbert Baker, and 78.67% voted for David Burgess. *Id.*

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[24] The Democratic performance numbers indicate the degree to which the voters in the given precincts or district have supported Democratic candidates.

Proposed House District 51 retains benchmark District 56's status as a district with a majority of total black population and BVAP, as shown below.

	TPOP [25]	BPOP	TVAP [26]	BVAP (Ga.)
Benchmark H.D. 56	41,311	24.801 (60.03%)	32,393	17,724 (54.72%)
Proposed H.D. 51	43,675	25,162 (57.61%)	34,793	18,118 (52.07%)

Pl Exs. 12C, 13B. Moreover, proposed District 51 retains a majority black voter registration level of 52.68%. Pl. Exs. 12D, 13B. Proposed House District 51 retains this status while making up benchmark District 56's significant population shortage from the current ideal district size of 45,480. Proposed District 51 is only 1,805 persons, or 3.97%, short of the ideal district size. Pl. Exs. 12C, 13B.

b. Proposed House District 95

Proposed House District 95 is a single-member district that includes all of Hancock, Glascock, Taliaferro and Warren Counties, and parts of Baldwin, McDuffie and Putnam Counties, Georgia. Pl. Exs. 12A, 14A. The proposed district includes territory currently within benchmark House District 120, which encompasses all of Taliaferro, Warren, Glascock and Hancock Counties and parts of McDuffie and Baldwin Counties. Pl. Ex. 11A.

The benchmark House District 120 is 7,056 people, or 15.51%, short of the ideal district size. Pl. Exs. 11D, 14B. Black voter registration numbers have remained relatively steady over the past three election cycles in the benchmark House District 120, with 52.14% black voter registration in 1996, 52.90% in 1998, and 52.07% in 2000. Pl. Exs. 11E, 14B.

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[25] "TPOP" refers to total population.

[26] "TVAP" refers to total voting age population.

Voters within benchmark House District 120 tend to vote for Democratic Party candidates as demonstrated by an overall Democratic Performance score of 62.80%, as well as the Democratic performance numbers for the individual election years of 1996 (61.37%), 1998 (66.77%) and 2000 (57.06%). Pl. Exs. 11E, 14B. Specifically, 77.32% of the voters within House District 120 voted for Thurmond in the 1998 Democratic Party primary runoff election. In addition, 72.74% of the voters in House District 120 voted for Thurmond in his general election victory. Pl. Exs. 11E, 14B. Voters within House District 120 have also supported other African American Democratic candidates running for state-wide office. In 1998 Thurbert Baker received 64.49% of the district's votes in his race for Attorney General and, in 2000, David Burgess garnered 72.17% of the vote for Public Service Commissioner. Pl. Exs. 11E, 14B.

Benchmark House District 120 is currently held by Representative Sistie Hudson, a white Democrat. Int. Ex. 31 at 4. In 1996, Representative Hudson faced a primary challenge from an African American opponent, Frederick Favors. *Id.* at 4-5. Representative Hudson received 51.3% of the vote, while Ms. Favors received 48.7%. *Id.*

Plaintiff has calculated an overall Democratic performance score of 56.61% for proposed House District 95. In addition, the State projects Democratic performance numbers of 53.04% using 1996 election results, 62.65% using 1998 results, and 51.97% using 2000 results. Pl. Ex. 14B. In looking at the past political performance of the territory contained within proposed House District 95, voters within the proposed district also supported Michael Thurmond at a rate of 75.01% in the 1998 primary runoff, and 67.36% in his general election contest. Additionally, these voters supported Thurbert Baker at a rate of 59.78% and David Burgess at 66.57%. Pl. Exs. 12D, 14B.

The demographics of benchmark District 120 and Proposed House District 95 are shown below:

	TPOP	BPOP	TVAP	BVAP(Ga.)
Benchmark H.D. 120	38,424	21,604 (56.23%)	28,359	15,007 (52.92%)
Proposed H.D. 95	44,590	21,632 (48.51%)	33,210	14,979 (45.10%)

Pl. Exs. 11D, 12C, 14B. Additionally, 44.06% of registered voters in the proposed District 95 are African American. Pl. Exs. 12D, 14B.

This district also makes up benchmark District 120's population shortage from the current ideal district size of 45,480. Proposed District 95 is only 890 persons, or 1.96%, short of the ideal district size. Pl. Exs. 12C, 14B.

c. Proposed House District 97

Proposed House District 97 is a single-member district located wholly within Richmond County, Georgia. Pl. Exs. 12A, 15A. House District 97 embraces territory included within benchmark House District 117, which is also wholly contained within Richmond County. Pl. Ex. 11A.

The benchmark House District 117 is 10,918 people, or 24.01%, short of the ideal district size. Pl. Exs. 11D, 15B. Black voter registration levels have increased in the existing House District 117 over the past three election cycles, from 71.80% in 1996, to 75.32% in 1998, and finally to 75.59% in 2000. Pl. Exs. 11E, 15B.

Voters within the benchmark House District 117 tend to vote heavily for candidates of the Democratic Party, demonstrated by an overall Democratic Performance score of 79.13%, as well as the Democratic performance numbers for the individual election years of 1996 (76.11%), 1998 (77.73%) and 2000 (79.93%). Pl. Exs. 11E, 15B.

Specifically, 73.73% of the voters within existing House District 117 voted for Michael Thurmond in the 1998 Democratic Party primary runoff election, and 85.27% voted for him in the general election. Pl. Exs. 11E, 15B. Additionally, voters within benchmark House District 117 demonstrated electoral support for other African American Democratic candidates running for statewide office by voting at a rate of 83.09% for Thurbert Baker in 1998, and at 85.47% for David Burgess. Pl. Exs. 11E, 15B.

Proposed District 97 retains much of the overall Democratic performance of benchmark District 117. Plaintiff has calculated an overall Democratic performance score of 63.59% for this proposed District, and projected Democratic performance numbers of 60.47% using 1996 election results, 64.37% using 1998 results and 63.08% using 2000 election results. Pl. Ex. 15B. In looking at the past political performance of the territory contained within proposed House District 97, 72.92% of the voters in the proposed district supported Michael Thurmond in the 1998 primary runoff and 70.03% supported him in the general election. Additionally, 67.74% of these voters supported Thurbert Baker and 71.11% supported David Burgess. Pl. Exs. 12D, 15B.

The proposed House District 97 also retains District 117's status as a district in which African American voters com prise a majority of both the total and voting age populations. The following table compares the demographics of the benchmark District 117 and proposed House District 97, using the 2000 census figures:

	TPOP	BPOP	TVAP	BVAP (Ga.)
Benchmark H.D. 117	34,562	26,945 (77.96%)	23,822	17,637 (74.04%)
Proposed H.D. 97	43,531	25,235 (57.97%)	31,919	16,994 (53.24%)

Pl. Exs. 11D, 12C, 15B. Additionally, proposed District 97 retains District 117's majority black voter registration at a level of 54.53%. Pl. Exs. No 12D, 15B.

Proposed District 97 is only 1,949 persons, or 4.29%, short of the ideal district size. Pl. Exs. 12C, 15B.

d. Proposed House District 100

Proposed House District 100 is a single-member district that contains all of Burke County and part of Richmond County, Georgia. Pl. Exs. 12A, 16A. The proposed district 100 embraces territory included within benchmark House District 116, which also contains all of Burke County and part of Richmond County, Georgia. Pl. Ex. 11A.

Based on the population statistics from the 2000 census, the benchmark House District 116 is 6,161 persons, or 13.55%, short of the ideal district size. Pl. Exs. 11D, 16B. Levels of black voter registration have increased in the existing House District 116 over the past three election cycles, from 52.75% of total voter registration in 1996, to 54.59% in 1998, and to 54.29% in 2000. Pl. Exs. 11E, 16B.

Voters within benchmark House District 116 tend to vote heavily for Democratic Party candidates, as demonstrated by an overall Democratic performance score of 62.13%, and the Democratic performance rates for the individual election years of 1996 (60.72%), 1998 (62.88%) and 2000 (59.83%). Pl. Exs. 11E, 16B. Specifically, 74.88% of the voters in benchmark House District 116 voted for Michael Thurmond in his 1998 Democratic Party primary runoff election, and 69.96% supported him in the general election. Pl. Exs. 11E, 16B. Furthermore, voters in benchmark House District 116 have supported other African American candidates running for statewide office, voting at a rate of 69.05% for Thurbert Baker in 1998, and 74.72% for David Burgess in 2000. Pl. Exs. 11E, 16B. Proposed House District 100 retains much of the overall Democratic performance of benchmark district

116, with a projected overall Democratic performance score of 62.56%, and projected Democratic performance rates of 61.13% using 1996 election results, 63.53% using 1998 results, and 60.14% for the 2000 election results. Pl. Ex. 16B. In looking at the past political performance of the territory contained within proposed House District 100, 74.98% of voters supported Michael Thurmond in the 1998 primary runoff, and 70.37% supported him in his general election contest. Pl. Ex. 12 D. Additionally, 69.48% of these voters supported Thurbert Baker and 74.68% supported David Burgess. Pl. Exs. 12D, 16B.

Like benchmark District 116, proposed House District 100 has a majority African American population and voting age population. The following table compares the demographics of the benchmark District 116 and proposed House District 100, using the 2000 census figures:

	TPOP	BPOP	TVAP	BVAP (Ga.)
Benchmark H.D. 116	39,319	22,342 (56.82%)	26.409	13,947 (52.81%)
Proposed H.D. 100	44,193	24,226 (54.82%)	30,755	15,394 (50.05%)

Pl. Exs. 11D, 12C, 16B. Additionally, proposed House District 100 has a majority black voter registration level of 54.67%. Pl. Exs. 12D, 16B.

Proposed House District 100 is only 1,287 persons, or 2.83%, short of the ideal district size. Pl. Exs. 12C, 16B.

e. Proposed House District 113

Proposed House District 113 is a single-member district located wholly within Muscogee County, Georgia. Pl. Exs. 12A, 17A. The proposed district embraces territory included within benchmark House District 134, which is also wholly contained within Muscogee County. Pl. Ex. 11A.

Based on the population statistics from the 2000 census, the benchmark House District 134 is 14,518 persons, or 31.92%, short of the ideal district size. Pl. Exs. 11D, 17B. Black voter registration levels have increased in the existing House District 134 over the past three election cycles, from 72.87% of total voter registration in 1996, to 74.26% in 1998, and finally to 76.34% in 2000. Pl. Exs. 11E, 17B.

Voters within the benchmark House District 134 tended to vote heavily for Democratic Party candidates, as demonstrated by an overall Democratic Performance score of 84.72%, and the Democratic performance rates for the individual election years of 1996 (68.06%), 1998 (87.93%) and 2000 (84.58%). Pl. Exs. 11E, 17B. Specifically, 71.70% of the voters in the benchmark House District 134 voted for Michael Thurmond in the 1998 Democratic Party primary runoff election, and 90.11% of voters cast their ballots for him in the general election. Pl. Exs. 11E, 17B. Additionally, voters within the benchmark House District 134 demonstrated significant electoral support for other African American Democratic candidates running for statewide office. In 1998, 91.03% of voters supported Thurbert Baker and, in 2000, 88.90% voted for David Burgess. Pl. Exs. 11E, 17B.

Proposed House District 113 retains much of the overall Democratic performance of benchmark District 134, with an overall Democratic performance score of 75.04%, and specific projected Democratic performance numbers of 64.81% using 1996 election results, 75.24% using 1998 results, and 73.16% using 2000 election results. Pl. Ex. 17B.

Based on the past political performance of the territory contained in proposed House District 113, 69.38% of voters within the proposed district supported Michael Thurmond in the 1998 primary runoff and 77.38% supported him in his general election contest. Additionally, 79.45% of these voters supported Thurbert Baker, and 78.56% supported David Burgess. Pl. Exs. 12D, 17B.

Like benchmark District 134, proposed District 113 has a majority of African American population and voting age population. The following table compares the demographics of the benchmark District 134 and proposed House District 113, using the 2000 census figures:

	TPOP	BPOP	TVAP	BVAP(Ga.)
Benchmark H.D. 134	30,962	21,905 (70.75%)	20,471	14,042 (68.59%)
Proposed H.D. 113	43,806	25,843 (58.99%)	31,305	16,985 (54.26%)

Pl. Exs. 11D, 12C, 17B. Additionally, proposed House District 113 has a majority black voter registration at a level of 61.88%. Pl. Exs. 12D, 17B.

Proposed House District 113 is only 1,674 persons, or 3.68%, short of the ideal district size. Pl. Exs. 12C, 17B.

Under the proposed plan, two incumbent minority legislators, Representatives Carolyn Hugley and Maretta Taylor, are drawn into the proposed District 113. See Int. Ex. 31 at 8 (Westmoreland Decl.). Intervenors introduced testimony that these are the only two incumbent Democrats included in any one proposed district in any of the three plans before this court. *Id.* An open seat was created in proposed House District 109, a majority-white district adjacent to proposed district 113. *Id.*

f. Proposed House District 124

Proposed House District 124 is a two-member district located wholly within Chatham County, Georgia. Pl. Ex. 12A. Proposed District 124 embraces territory included in benchmark House Districts 148 and 149, which were also wholly contained within Chatham County. Pl. Ex. 11A.

According to population statistics from the 2000 census, benchmark House District 148 was short 10,343 persons, or 22.74%, and benchmark District 149 was 12,815 persons, or

28.18%, short of the ideal district size. Pl. Exs. 11D, 18B. Black voter registration levels have increased in the benchmark House District 148 over the past three election cycles, from 64.19% in 1996, to 65.37% in 1998, and finally to 68.12% in 2000. Pl. Exs. 11E, 18B. Black voter registration levels have decreased in benchmark House District 149 over the past three election cycles, from 70.80% of total voter registration in 1996, to 70.46% in 1998, and finally to 67.96% in 2000. Pl. Exs. 11E, 18B.

Voters in benchmark House District 148 tend to vote for Democratic Party candidates, as demonstrated by an overall Democratic performance score of 76.58%, and Democratic performance numbers for individual election years of 1996 (72.60%), 1998 (79.26%) and 2000 (74.75%). Pl. Exs. 11E, 18B. Specifically, 82.23% of voters in benchmark House District 148 voted for Michael Thurmond in the 1998 Democratic Party primary runoff election, and 83.02% supported him in the general election. Pl. Exs. 11E, 18B. Additionally, voters within benchmark House District 148 demonstrated electoral support for other African American Democratic candidates running for statewide office. In 1998, 82.90% of voters supported Thurbert Baker for Attorney General and, in 2000, 82.83% supported David Burgess. Pl. Exs. 11E, 18B.

Voters from benchmark House District 149 also tend to support Democratic Party candidates, as demonstrated by an overall Democratic performance score of 81.20%, and Democratic performance numbers for individual election years of 1996 (77.61%), 1998 (81.89%) and 2000 (78.35%). Pl. Exs. 11E, 18B. 89.39% of the voters in benchmark House District 149 voted for Michael Thurmond in the primary runoff, and 88.84% supported him in the general election. Pl. Ex. 18B. In 1998, 89.34% of voters in benchmark District 149 voted for Thurbert Baker, and, in 2000, 85.90% voted for David Burgess. Pl. Exs. 11E, 18B.

Proposed House District 124 has an overall Democratic performance score of 67.67%, and projected Democratic performance numbers of 63.16% using 1996 election results, 69.79%, using 1998 results, and 66.46% for the 2000 election results. Pl. Ex. 18B. In looking at the past political performance of the territory contained within proposed House District 124, 81.50% of voters within the proposed district supported Michael Thurmond in the 1998 primary runoff and 75.83% supported him in his general election contest. 76.11% of these voters supported Thurbert Baker and 75.39% supported David Burgess. Pl. Exs. 12D, 18B.

As in benchmark Districts 148 and 149, in proposed District 124 African American voters make up a majority of both the total and voting age populations. The following table compares the demographics of the benchmark House Districts 148 and 149 with proposed House District 124, using the 2000 census figures:

	TPOP	BPOP	TVAP	BVAP(Ga.)
Benchmark H.D. 148	35,137	25,708 (73.17%)	24,449	16,619 (67.97%)
Benchmark H.D. 149	32,665	22,502 (68.89%)	24,642	15,520 (62.98%)
Proposed 124	86,779	51,600 (59.46%)	64,295	34,811 (54.14%)

Pl. Exs. 11D, 12C, 18B. Additionally, proposed District 124 has a majority black voter registration level of 55.21%. Pl. Exs. 12D, 18B.

The ideal district size for proposed District 124 is 90,960, twice the ideal district size of a single-member district. Thus, proposed District 124 is 2,091 persons, or 4.60%, short of the ideal district size. Pl. Exs. 12C, 18B.

g. Proposed House District 125

Proposed House District 125 is a single-member district located wholly within Chatham, Georgia. Pl. Exs. 12A, 19A. House District 125 embraces territory included within benchmark House District 151, which is also wholly within Chatham County. Pl. Ex. 11A.

Based on population statistics from the 2000 census, the benchmark House District 151 is 11,450 persons, or 25.18%, short of the ideal district size. Pl. Exs. 11D, 19B. Black voter registration levels have increased in benchmark House District 151 over the past three election cycles, from 46.18% in 1996 to 47.93% in 1998, and to 48.40% in 2000. Pl. Exs. 11E, 19B.

Voters in benchmark House District 151 tend to vote for Democratic Party candidates, as demonstrated by an overall Democratic performance score of 64.31%, and the Democratic performance numbers for the individual election years of 1996 (61.47%), 1998 (67.19%) and 2000 (61.39%). Pl. Exs. 11E, 19B. Specifically, 75.40% of voters in benchmark House District 151 voted for Michael Thurmond in the 1998 Democratic Party primary runoff election, and 71.67% of voters supported him the general election. Pl Exs. 11E, 19B. Voters in benchmark House District 151 have demonstrated electoral support for other African American Democratic candidates running for statewide office: in 1998, 72.36% voted for Thurbert Baker and, in 2000, 72.78% voted for David Burgess. Pl. Exs. 11E, 19B.

Proposed House District 125 has an overall Democratic performance score of 59.40%, and specific projected Democratic performance levels of 56.64% using 1996 election results, 62.75% using 1998 results, and 56.56% using 2000 election results. Pl. Ex. 19B. 70.77% of voters in the proposed district supported Michael Thurmond in the 1998 primary runoff, and 67.13% supported him in his general

election contest. Additionally, 67.84% of these voters supported Thurbert Baker, and 68.40% supported David Burgess. Pl. Exs. 12D, 19B.

While Proposed House District 125 has a majority black population, it does not have a majority BVAP. The following table compares the demographics of the benchmark House District 151 and proposed House District 125, using the 2000 census figures:

	TPOP	BPOP	TVAP	BVAP(Ga.)
Benchmark H.D. 151	34,030	19,199 (56.42%)	26,014	13,550 (52.09%)
Proposed H.D. 125	44,644	22,473 (50.34%)	33,869	15,398 (45.46%)

Pl. Exs. 11D, 12C, 19B. Proposed House District 125 has a black voter registration level of 41.67%. Pl. Exs. 12D, 19B. Proposed District 125 is only £36 persons, or 1.84%, short of the ideal district size. Pl. Exs. 12C, 19B.

h. Multi-Member Districts

Some of the districts in Georgia's proposed House plan are multi-member districts. *See* Pl. Exs. 12C, 12D. Plaintiff's expert report lists the proposed districts, and the number of seats and BVAP of each district. Pl. Ex. 25. There are six proposed multi-member districts with BVAPs of 50% or higher: District 43 has a BVAP of 65.18%; District 48 has a BVAP of 61.13%; District 49 has a BVAP of 61.86%; District 60 has a BVAP of 59.51%; District 61 has a BVAP of 58.33%; and District 124 has a BVAP of 54.14%.[27] Pl. Ex. 25, App. 3; Tr., 2/5/02, a.m. at 79-81. According to plaintiff's expert, the probability that minority voters will elect

[27] BVAP numbers reflect Georgia's method of calculating BVAP.

candidates of their choice varies from 80% to near certainty in these multi-member districts. *Id.*

F. State Senate Reapportionment Plan

The Georgia Constitution mandates that the Georgia Senate consist of 56 Senators elected from single-member districts apportioned among the respective districts of the State of Georgia. Ga. Const., Art. III, § II, P I(a); O.C.G.A. § 28-2-2. Members of the Georgia Senate are elected for two-year terms and serve until the time of the convening of the next General Assembly. Ga. Const., Art. III, § II, P V(a). Members of the Georgia Senate are elected at the same time as the Governor. Ga. Const., Art. V, § I, P II.

The 2000 census results show a statewide population of 8,186,453 people. Consequently, the ideal size for the 56 Senate Districts for purposes of one person-one vote is 146,187 people. PPFF P 407. The State of Georgia's Senate districts have traditionally been drawn with a deviation of plus or minus five percent from the ideal district size. *Id.* P 411. According to the 2000 census data, only two of the benchmark Senate districts with a total black population, total BVAP, or black voter registration over 50% were within that traditional deviation requirement. Pl. Exs. 1D, 1E. All but three of the ten majority BVAP districts deviated from the ideal district size by-14.02% to -26.94%. *Id.*

On August 10, 2001, the Senate Redistricting Committee leadership called for a final vote on a Senate redistricting plan, SENPLAN2U, shortly after the plan had been distributed to the Senators for review. Ms. Meggers testified that the Redistricting Office did not prepare the demographic and political performance reports for plan SENPLAN2U until the morning of the Friday it was enacted. U.S. Ex. 702, 76:6-77:22.

The second proposed Senate reapportionment plan became Senate Bill 1EX1 and was adopted by the Georgia State

Senate on August 10, 2001, by a vote of 29 to 26. PPFF PP 412, 413. Senator Regina Thomas of the Savannah area was the only African American Senator who voted against the plan. *Id.* P 413. The House of Representatives passed Senate Bill 1EX1 on August 17, 2001, by a vote of 101 to 71. *Id.* Representative Dorothy Pelote, also of the Savannah area, was the only African American representative to vote against the plan. *Id.* The Governor signed Senate Bill 1EX1 into law on August 24, 2001, as Act No. 1EX6.*Id.* P 414.

1. Demographics of Benchmark and Proposed Districts

The State of Georgia s current Senate districting map is the result of a mediated agreement between the State of Georgia and the United States Department of Justice in 1997. Based upon the 2000 census statistics, there are thirteen Senate Districts in the benchmark Senate plan with a total black population of over 50%. PPFF at P 408. These are Senate Districts 2, 10, 12, 15, 22, 26, 35, 36, 38, 39, 43, 44 and 55. *Id.* The same thirteen Senate Districts have total black voter registration levels of 50% and higher. PPFF at P 410. Twelve of these districts have BVAP of 50% or higher. *Id.* P 409. These are Senate Districts 2, 10, 12, 15, 22, 26, 35, 36, 38, 39, 43 and 55. *Id.* Senate District 44, which currently has 52.80% total black population and 53.72% black voter registration, has a 49.62% BVAP.[28]

Like the benchmark plan, the proposed redistricting plan contains 13 Senate Districts with a total black population of over 50%. However, the proposed plan contains only eight Senate Districts in which black voter registration is over 50%. The State contends that the proposed plan also creates 13 Senate Districts in which the BVAP is over 50%. The United

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[28] This BVAP is calculated according to Georgia's method; according to the Attorney General's Guidance, the BVAP of District 44 is 48.52%.

States disputes this calculation. According to the United States' interpretation of the census data, there are only 11 districts with majority-minority BVAPs. When BVAP is calculated in accordance with the Attorney General's Guidance, proposed Senate Districts 2 and 34 fall below 50% BVAP.

Furthermore, the black population of Senate District 44 would be severely reduced under the proposed plan. Benchmark District 44 has a BVAP of almost 50%. The proposed District 44 has a BVAP of approximately 34%.

The following table compares the demographics of the benchmark Senate Districts with the proposed Senate Districts, using the 2000 census statistics:

Dist.	Black Pop.		BVAP (Ga.)		BVAP (U.S.)		Black Reg.	
	Bench-mark	Prop.	Bench-mark	Prop.	Bench-mark	Prop.	Bench-mark	Prop.
2	64.76	54.99	60.58	50.31	59.98	49.81	62.38	48.42
10	73.50	64.87	70.66	64.14	69.72	63.42	69.81	63.06
12	59.31	53.51	55.43	50.66	54.94	50.22	52.48	47.46
15	64.32	53.74	62.05	50.87	60.93	50.05	72.69	50.25
22	66.84	54.71	63.51	51.51	62.65	50.76	64.07	49.44
26	66.62	54.88	62.45	50.80	61.93	50.39	62.79	48.27
34	36.84	52.94	33.96	50.54	33.32	49.53	34.22	49.50
35	77.68	62.71	76.02	60.69	74.95	59.79	81.00	64.73
36	65.30	61.90	60.36	56.94	59.33	55.94	61.39	58.65
38	78.06	63.59	76.61	60.29	75.57	59.47	75.33	60.38
39	58.65	60.01	54.73	56.54	53.87	55.73	59.46	59.79
43	89.63	64.88	88.91	62.63	87.67	61.70	89.14	63.11
44	52.80	38.23	49.62	34.71	48.52	33.93	53.72	36.28
55	73.73	61.85	72.40	60.64	70.39	59.09	73.07	60.99

U.S. Ex. 110; Pl. Ex. 25.

2. Contested Districts

a. Senate District 2

Both the benchmark and proposed Senate District 2 are located within Chatham County, Georgia. Given the ideal district size of 146,187 persons for a Senate district after the 2000 census, the population of benchmark Senate District 2 was 35,629 people, or 24.37%, short of the ideal size. PPFF P 428; *see* also Pl. Ex. 1-D. The proposed District 2 is 7,217 people, or 4.94%, short of the ideal district size. *Id.* P 429.

According to 2000 census statistics, the BVAP of the benchmark Senate District 2 is approximately 60%. Pl. Ex. 3B. The BVAP of the proposed Senate District 2 is either 50.31%, according to plaintiff, or 49.81%, according to the United States. Pl. Ex. 1D; U.S. Ex. 110. The State argues that, because of population changes alone, it was inevitable that the BVAP of District 2 would decrease.

Black registered voters compose 48.42% of the proposed Senate District 2. In contrast to Senate District 2, in at least six of the majority-minority districts, black registration levels are higher than BVAP. The United States suggests that calculations of BVAP for Senate District 2 may include an undetermined number of ineligible voters. Senate District 2, according to Ms. Meggers, is home to Savannah State University and the Savannah School of Art and Design. USPFF P 177. Ms. Meggers was unaware of the number of students at the schools, whether the Schools have on-campus housing, or whether all of the students were registered voters. *Id.* She further testified that a student population of 1,500, which she would not consider "large," would constitute approximately 1.5% of Senate District 2's voting age population. *Id.*

Senator Regina Thomas, an African American, is the current incumbent in Senate District 2. Senate District 2 has been represented by several African American Senators.

Without opposition, Roy L. Allen, who is African American, won the Democratic Party nomination and the General Election in 1992. PPFF P 431. Without opposition, Diane H. Johnson, who is African American, won the Democratic Party nomination and the General Election in 1994 and 1996. PPFF PP 432, 433. In 1998, Senator Johnson was opposed by Regina Thomas in the Democratic primary, but Johnson won by a 297-vote margin of victory. *Id.* P 434. In 1998, Senator Johnson was re-elected to her third term representing Senate District 2 without opposition in the General Election. *Id.* P 435.

In 1999, Senator Johnson was indicted and convicted of federal mail fraud. *Id.* P 436. She resigned from the State Senate on November 12, 1999, and the Governor called a special election to fill the vacant Senate seat. *Id.* This special election was precleared by the Department of Justice. *Id.* P 437; (DOJ File No. 1999-3631 (Dec. 29, 1999)). The following candidates qualified to run in the special nonpartisan election held on December 21, 1999, to succeed Senator Johnson: Pro-Life Anderson (white man), Dana F. Braun (white man), Willie Brown (African American man), Bob Bryant (African American man), Charles Gordon (African American man), and Regina Thomas (African American woman). *Id.* Regina Thomas won that election. *Id.*

Senator Thomas testified that she was a member of the Senate Reapportionment Committee. However, she testified that her role in the redistricting process was "just to be on the committee" and she did not do anything more than attend every meeting. U.S. Ex. 704, 38:25-39:3, 40:12-24. She voted against the redistricting plan and has expressed her displeasure with the re-drawing of her district. *Id.* She believes that she will have difficulty being re-elected and that African American voters will have fewer opportunities to elect candidates of choice in the re-drawn Senate District 2. Plaintiff attempts to discredit Senator Thomas as being

"surprisingly unfamiliar with the demographics of her district" because she indicated at her deposition testimony that her district had 49% BVAP, and not 50%. PPFF at P 421 (citing Senator Thomas Dep. at 146-47. However, as discussed above, using the method of calculating BVAP mandated by the United States' Guidance, proposed Senate District 2 has a BVAP of less than 50%.

In a 1999 runoff election, Senator Thomas defeated her white opponent, Dana Braun, by slightly more than 70 votes,[27] when benchmark Senate District 2 had a black registration level of more than 60%. PPFF P 440. When Thomas ran in November 2000, she won reelection in the General Election by a vote of 22,723 (77.8%) to 6,494 (22.2%). *Id.* P 441. Her opponent in that general election was a white Republican, who apparently did not have the support of the Republican Party. *See* U.S. Ex. 727, 86:19-88:13 (Senate minority leader for Republican Party describing Thomas' opponent as a "nut case" and "flaky, half-crazed Republican that runs for office now and then); *see also* U.S. Ex. 704, 32:19-23, 187:23-188:2, 189:19-25 (Thomas testified that opponent was a pizza delivery man, not well known in the community, and had been arrested for impersonating a police officer and carrying concealed weapons). Although Senator Thomas won that 2000 election by a substantial majority, she did not receive a majority of the white vote. U.S. Ex. 601.

The United States presented testimony from eleven witnesses from Chatham County about proposed Senate District 2, including two State Senators, four African American City Council Aldermen, two Chatham County Commissioners, and three members of the Executive Committee of the Savannah Branch of the NAACP. Almost all of the witnesses testified

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[27] The margin of victory was between 73 and 76 votes.

to the existence of racially polarized voting in Senate District 2. For example, Dr. Prince Jackson, an Executive Committee member of the local NAACP, testified that it is his "belief that African-American voters typically vote for African American candidates, and white voters typically vote for white candidates." EU.S. Ex. 503 P 8 (Jackson decl.).

In addition, Richard Shinhoster, an Executive Committee member of the local NAACP, testified that a slim majority of BVAP may not be sufficient to elect a candidate of choice if voter turnout rates are low; the African American community "cannot always be assured that a black can be elected when the majority—when the ratio is so close. . . ." Shinhoster dep. at 16. Shinhoster also claims that an increase in BVAP in proposed Senate District 2 is needed because "voting pattern[s] in Savannah and Chatham County are polarized along racial lines." U.S. Ex. 509 P 8 (Shinhoster decl.). On the other hand, on cross-examination, Savannah City Alderman Helen Johnson testified that "people don't really vote because of racial issues or because their particular race right in the city elections." Johnson dep. at 41.

Several of the lay witnesses from Senate District 2 presented by the United States testified that the addition of the Tybee Island, Isle of Hope, and Thunderbolt areas in the proposed Senate District 2 "will make it more difficult for African American voters to elect their chosen candidates." U.S. Ex. 509 P 11 (Shinhoster decl.); U.S. Ex. 506 P 11 (D. Jones decl.).

Despite the existence of racial polarization, these witnesses also testified that African American candidates of choice can be elected to office when they are professional and well-respected by the white community. For example, some of the United States' witnesses stated that they considered Regina Thomas to be a strong African American candidate and very popular in her Senate District. Jackson dep. at 62-63; Shinhoster dep. at 26-28, 68. Alderman Gwendolyn Goodman

testified that, despite a tendency of people to vote according to race, when an African American candidate is known as a professional and respected by the white community, many white voters will "go with what is right." Goodman dep. at 29-30.

The United States' expert, Dr. Richard Engstrom, analyzed local election data from the benchmark Senate District 2, including data from elections in municipalities and counties within benchmark Senate District 2. The specific results of his assessment of racially polarized voting are found in Part 2G of this Memorandum Opinion.

b. Senate District 12

Both the benchmark and proposed Senate District 12 are located in southwest Georgia. The benchmark Senate District 12 is 25,982, or 17.8%, below the ideal district size. According to 2000 census data, the benchmark Senate District 12 has a BVAP of 55.4% (Ga.) or 54.94% (U.S.). Under the Senate plan before the court, Senate District 12 will have a BVAP of 50.66% (Ga.) or 50.22% (U.S.). Plaintiff argues that some drop in BVAP was inevitable. Pl. Ex. 4B; PPFF P 474. However, several majority-black precincts were removed from benchmark Senate District 12 in drawing the proposed district. U.S. Ex. 118.

In addition to reducing BVAP, the proposed Senate District 12 reduces the black registration as a percentage of overall registration from approximately 52.5% to 47.5%. In 1996, 48.16% of the registered voters in the benchmark Senate District 12 were African American. PPFF P 483. That number grew to 50.69% in 1998 and to 52.48% in 2000. *Id.* Using the proposed Senate District 12 lines, the percentage of black registered voters would have been 44.86% in 1996, 46.57% in 1998 and 47.56% in 2000. *Id.;* Pl. Ex. 4B.

The percentage of registered voters who are black, 47.46%, is less that the BVAP of proposed Senate District 12, either

50.66% (Ga.), or 50.22% (U.S.). PPFF P 487. In contrast to the proposed Senate District 12, black registration levels are higher than BVAP in at least six of the other proposed majority-minority districts. The United States suggests that the BVAP in proposed Senate District 12 may include an undetermined number of ineligible voters. Senate District 12 includes two or three small colleges in Albany, and a state prison in Calhoun County. U.S. Ex. 733, 124:22-23. Meggers did not know the enrollment of the colleges, but testified that the prison inmate population was approximately 1,100. *Id.* Furthermore, John White testified to his belief that a significant number of African American felons and ex-felons live in the district and cannot vote under state law, thus reducing the number of eligible voting age African Americans in the existing and proposed district. U.S. Ex. 513 P 27.

The past voting performance of precincts contained within proposed Senate District 12 in certain past statewide elections shows that 58.57% of voters in proposed Senate District 12 supported Michael Thurmond in his primary run-off, while 65.89% of voters supported him in the general election. Pl. Ex. 4B. In 1998, 64.53% of the voters in proposed Senate District 12 voted for Thurbert Baker for Attorney General and, in 2000, 65.83% voted for David Burgess for Public Service Commissioner. Pl. Ex. 4B.

In the 1992 Democratic Primary, Mark Taylor, a white man and current Georgia Lieutenant Governor, defeated Charles Sherrod, an African American man, to obtain the party nomination for Senate District 12. PPFF P 490. Mark Taylor won election to Senate District 12 in the 1992 General Election without opposition. *Id.* In 1994, Taylor was unopposed in the Democratic Primary and the General Election and won re-election. *Id.* Mark Taylor testified that, when first elected to the Senate, he had the political endorsement of the African American community. Taylor dep. at 20. In 1996, John White, an African American candidate, opposed Taylor

in the Democratic Party primary. PPFF P 491. Taylor defeated White by a margin of 15,043 (61.5%) to 9,406 (38.5%) votes. *Id.* Taylor went on to win the general election without opposition. *Id.*

Taylor ran for Lieutenant Governor in 1998, and the Senate District 12 seat became open. *Id.* P 492. White ran and lost narrowly to a local white attorney, Michael Meyer von Bremen, in the Democratic Party primary. *Id.* Meyer von Bremen won the primary by 51.4% of the votes. *Id.* Engstrom's expert report demonstrates that in that Democratic Party primary, virtually all the black voters voted for White, and almost none of the white voters voted for White. U.S. Ex. 601, Table 2.

Meyer von Bremen subsequently won the general election in 1998, won re-election in 2000, and is the current incumbent Senator in District 12. *Id.* A Clark University study found Meyer von Bremen to be supportive of minority issues. Pl. Ex. 23 at 9-10. However, both experts for the plaintiff and the United States have found that Senator Meyer von Bremen is not the candidate of choice of African American voters. Pl. Ex. 25, App. 2; U.S. Ex. 601, Table 2. Furthermore, several of the United States' witnesses testified that Senator Meyer von Bremen does not represent the interests of the African American community. U.S. Ex. 514 P 10 (Wright decl.); U.S. Ex. 512 P 7 (D. Williams).

In addition to the statistical evidence suggesting the existence of racially polarized voting in Senate District 12, the United States' witnesses testified about their experiences of racially polarized voting. Describing his 1992 defeat to Mark Taylor, a white candidate, Mr. Charles Sherrod stated that "Mr. Taylor won with about two-thirds of the votes. I did very badly in the white community." U.S. Ex. 510 P 6 (Sherrod decl.). He explains that "whites would vote for my white opponent. . . ." Sherrod admits in his deposition, however, that rural black voters also voted for Taylor and that

Taylor's financial resources greatly aided his success. Sherrod dep. at 58-59. Sherrod acknowledges that White, in 1996, ran a more competitive campaign against Taylor than he did in 1992; White had better financing, better organization, as well as popularity as "an announcer on the TV." *Id.*

Sherrod states in his affidavit that "most white voters in Southwest Georgia simply will not vote for black Senate Candidates." U.S. Ex. 510 P 11. He bases his opinion on the assumption that "whites get more support from black voters than black[s]" get from white voters, but indicated that if the reverse were true, it would change his opinion. Sherrod dep. at 94-96.

Albany City Commissioner Arthur Williams testified: "I believe Mr. White lost [the 1996 Senate District 12 primary election] because he could not compete with Mr. Taylor's money and because white voters responded to Mr. Taylor's use of the race card." U.S. Ex. 511. Williams contends that Taylor played the "race card" during his campaign by sending out literature that compared White to Williams and urged citizens to vote in the Democratic Party primary against White, and to not vote in the Republican Party primary. *Id.* PP 6, 8. Plaintiff suggests that the comparison of White to Williams in Taylor's campaign literature was not a racial appeal, but rather is explained by the fact that White and Williams had similar positions on issues concerning municipal contracts with minority-owned businesses and affirmative action in city employment. PPFF P 513 (citing U.S. Ex. 513 P 9 (White decl.); A. Williams dep. at 77-78).

The State argues that White's defeat at the polls was not due to racially polarized voting, but was rather the result of negative articles in the local and statewide press. One article published in the *Atlanta Constitution* on June 28, 1990, stated: "There is something appealing about the naked self-interest of State Representative John White's approach to public service. His blatant embrace of all that is bad about

politics ought to be offensive to any voter, but how can you get angry at such candid greed?" White dep. at 28-29, Exhibit 1. White admits that such articles might have affected white voters' decisions to vote for him or his opponent. White dep. at 6-7, 13.

White stated that he may not be a strong candidate among white voters. White dep. at 29, 33. He testified that three African American candidates were more successful at getting white votes than was he, but explained that African American candidates were able to garner white votes where they had the support of white political figures. White dep. at 34-35, 38, 123-24. White believes that he lost to Meyer von Bremen because "some black people did not turn out because they figured [White] was a sure bet to win." U.S. Ex. 514 P 15 (White decl.).

Finally, several of the United States' witnesses believed that it would be close to impossible for an African American candidate to be elected in the proposed Senate District 12. U.S. Ex. 514 P 4 (Wright decl.); U.S. Ex. 512 P 4 (D. Williams decl.). Some of these witnesses, however, stated that white voters have supported some African American candidates such as an African American Superior Court Judge, Congressman Sanford Bishop and Michael Thurmond. Wright dep. at 25-26, 83-84.

The United States' expert analyzed local election data from the benchmark Senate District 12. The specific results of his assessment of racially polarized voting are found in Part 2G of this Memorandum Opinion.

c. Senate District 26

Both the benchmark and proposed Senate District 26 are substantially located within Bibb County, Georgia. According to the 2000 census data, the benchmark Senate District 26 is underpopulated by 42,119 people, or is 28.8% short of the ideal district size. The benchmark Senate District 26 has a

BVAP of 62.45% (Ga.) or 61.93% (U.S.). Proposed Senate District 26 has a BVAP of 50.80% (Ga.) or 50.39% (U.S.).

The percentage of black registered voters in the benchmark District 26 is 62.79%. PPFF P 529. That percentage decreases to 48.27% in the proposed District 26. *Id.* The number of black registered voters in the benchmark Senate District 26 grew from 46.51% to 48.27% from 1998 to the year 2000. *Id.* P 531. Levels of black voter registration in the precincts comprising proposed Senate District 26 increased from 46.5% of total voter registration in 1998, to 48.3% in the year 2000. Pl. Ex. 5B.

In contrast to proposed Senate District 26, black registration levels are higher than BVAP in at least six of the proposed majority-minority districts. The United States suggests that BVAP in Senate District 26 includes an undetermined number of ineligible voters residing in the district. USPFF P 382; U.S. Ex. 733, 126:2-22. Ms. Meggers testified that Mercer University is located in the proposed Senate District 26, but that she does not know the full-time student enrollment of the university. *Id.* Senator Brown also testified that he did not consider ineligible prison populations in drafting the proposed Senate District 26. USPFF P 383.

According to precinct returns for past elections, 71.67% of voters in the precincts in the proposed Senate District 26 voted 71.67% for Michael Thurmond in his 1998 primary runoff and 68.53% voted for Mr. Thurmond in his 1998 General Election race. Pl. Exs. 2D, 7B. In 1998, 66.92% of voters in those same precincts voted for Thurbert Baker in his Attorney General race, and 68.91% voted for David Burgess in his 2000 Public Service Commissioner race. Pl. Exs. 2D, 7B.

Senator Brown is the current incumbent in Senate District 26. Brown was originally elected in a special election in 1991, defeating Robert Reichert, a white man, by a margin of

7,403 (56.71%) to 5,651 (43.29%) votes. PPFF P 535. Senate District 26 at that time had a total black population of 46,623 (58.0%), and BVAP of 31,350 (52.79%). 47.4% of registered voters at that time were African American. *Id.*

In the 1992, 1994 and 1996 Democratic primaries and in the general elections, Brown was nominated and elected without opposition. *Id.* In the 2000 Democratic Party primary election, Brown had no opposition. *Id.* In the 2000 general election, Brown defeated Greg Williams, a Republican African American candidate, by a margin of 21,453 to 5,491 votes. *Id.*

Witnesses for the United States stated that, in their opinion, in Senate District 26, "most white voters vote for white candidates and most black voters tend to vote for black candidates." U.S. Ex. 515 P 6 (Abrams decl.); Abrams dep. at 70; U.S. Ex. 517 PP 8, 9 (Bivins decl.); U.S. Ex. 519 P 8 (Hart decl.).

African American candidates have been successful at attracting some white votes in Bibb County. One of the United States' witnesses, Albert J. Abrams, ran against a white opponent and won a seat on the Bibb County Board of Education in 1998, when the County's BVAP was 43% and the percentage of black registered voters was 39.86%. Abrams dep. at 13:14, 11:13. Abrams acknowledged that he benefitted from white crossover voting. *Id.* at 21. Samuel F. Hart, a District Commissioner and vice-chair of Bibb County Board of Commissioners, testified that he received a substantial portion of the white vote. Hart dep. at 24. Board of Education Member William Barnes also testified that he believed Senator Brown has been successful in winning white votes. Barnes dep. at 54-55.

Several of the United States' witnesses testified that they did not believe that African American voters would be able to elect a candidate of choice other than the current incumbent,

Senator Brown. See, e.g., U.S. Ex. 517 P 10 (Bivins decl.); U.S. Ex. 519 P 9 (Hart decl.); U.S. Ex. 725, 36:15-37:3. However, the witnesses also affirmed the existence of other viable African American candidates. Abrams dep. at 45, 61; Hart dep. at 44-45.

The United States' expert analyzed local election data from the benchmark Senate District 26. The specific results of his assessment of racially polarized voting are found in Part 2G of this Memorandum Opinion.

d. Senate District 15

The newly drawn Senate District 15 is wholly contained within Muscogee County, Georgia. Pl Exs. 2A, 5A. The benchmark Senate District 15 encompassed all of Chattahoochee County and part of Muscogee County. Pl. Exs. 1A, 5A.

The benchmark Senate District 15 is 39,385 people, or 26.94%, short of the ideal district size. PPFF P 562; Pl. Exs. 1D, 5B. Proposed Senate District 15 is only 6,821 persons, or 4.67%, short of the ideal district size. PPFF P 469; Pl. Exs. 2C, 5B.

Benchmark Senate District 15 has a total black population percentage of 65.75%, and BVAP of 62.05% (Ga.) or 60.93% (U.S.). PPFF P 561. The proposed Senate District reduces the percentage of BVAP to 50.87% (Ga.) or 50.05% (U.S.). PPFF P 568.

The percentage of black registered voters is reduced from 72.69% in the benchmark District 15 to 50.25% in the proposed District 15. *Id.* PP 563, 570. Black voter registration numbers have increased in the benchmark Senate District 15 over the past three election cycles, from 69.19% in 1996 to 70.79% in 1998 and finally to 73.00% in 2000. *Id.* P 563; Pl. Exs. 1E, 5B.

Voters within the benchmark Senate District 15 tend to vote heavily for Democratic Party candidates, as demonstrated by an overall Democratic performance score of 81.59%, as well as the Democratic performance levels for the individual election years of 1996 (71.23%), 1998 (82.93%) and 2000 (81.79%). Pl. Exs. 1E, 5B. 71.06% of the voters within the benchmark Senate District 15 voted for Michael Thurmond in the 1998 Democratic Party primary runoff election, and 87.59% supported him in the general election. Pl. Exs. 1E, 5B. Voters in benchmark Senate District 15 demonstrated electoral support for other African American Democratic candidates, voting for Thurbert Baker in 1998 at a rate of 88.95%, with 79.23% voting for David Burgess in 2000. Pl. Exs. 1E, 5B.

Proposed Senate District 15 retains an overall Democratic performance score of 65.91%, with projected Democratic performance levels of 61.99% using 1996 election results, 67.57% using 1998 results, and 63.44% using 2000 election results. Pl. Exs. 2D, 5B. 66.41% of voters in the precincts comprising the proposed district supported Michael Thurmond in the 1998 primary runoff, and 68.97% voted for him in the general election. PPFF P 567. Additionally, 71.18% of these voters supported Thurbert Baker, and 70.34% voted for David Burgess. Pl. Exs. 2D, 5B.

The current incumbent of Senate District 15 is Senator Ed Harbison, an African American man. PPFF P 571. In the 1992 Democratic Party primary for Senate District 15, Harbison defeated Joseph Wiley, an African American man, for the party nomination. *Id.* Harbison defeated William Wright, his Republican African American opponent, in the 1992 General Election. *Id.* P 572. Harbison had no opposition in the 1994, 1996, 1998 and 2000 Democratic primaries and general elections. *Id.*

e. Senate District 22

The newly drawn Senate District 22 is wholly contained within Richmond County, Georgia. PPFF P 574; Pl. Exs. 2A, 6A. Benchmark Senate District 22 is also wholly contained within Richmond County. PPFF P 575; Pl. Exs. 1A, 6A.

The benchmark Senate District 22 is underpopulated from the ideal district size by 37,675 people or 25.77%. PPFF P 580; Pl. Exs. 1D, 6B. The proposed Senate District 22 makes up for this shortage, and is only 7079 people, or 4.85%, below the ideal size.

The benchmark Senate District 22 has a total black population of 66.84% (Ga.). PPFF P 579. The proposed Senate District 22 has a total black population of 54.71%. *Id.* P 586. The proposed Senate District 22 would experience a decrease in BVAP from 63.51% (Ga.) or 62.65% (U.S.), to 51.15% (Ga.) or 50.76% (U.S.). *Id.* PP 576, 586. The percentage of black registered voters would also fall from 64.07% to 49.44%. *Id.* PP 581, 587.

Voters within the benchmark Senate District 22 have supported Democratic Party candidates, as demonstrated by an overall Democratic performance score of 72.46%, and Democratic performance numbers for the individual election years of 1996 (71.02%), 1998 (71.34%), and 2000 (71.46%). Pl. Exs. 1E, 6B. Specifically, 67.85% of the voters within the existing Senate District 22 voted for Michael Thurmond in the 1998 Democratic Party primary runoff election, and 76.64% supported him in the general election. Pl. Exs. 1E, 6B. Additionally, 73.97% of voters in the benchmark Senate District 22 voted for Thurbert Baker in 1998, and 77.41% voted for David Burgess in 2000. Pl. Exs. 1E, 6B.

The proposed Senate District 22 has an overall Democratic performance score of 62.28%, and projected Democratic performance numbers of 60.98% using 1996 election results, 63.19% using 1998 results, and 59.98% for the 2000 election

results. PPFF P 584; Pl. Exs. 2D, 6B. 65.09% of voters in precincts comprising the proposed district supported Michael Thurmond in the 1998 primary runoff, and 66.91% voted for him in the general election. PPFF P 585. Additionally, these voters supported Thurbert Baker by 63.87% and David Burgess by 69.05%. *Id.;* Pl. Exs. 2D, 6B.

Senator Charles Walker is the current incumbent of State Senate District 22 and is the Majority Leader in the Senate. Since his election to the Senate in 1990, Mr. Walker has faced only one white primary opponent, David Moretz. USPP P 588. He has faced Republican opposition only one time, by a white man, D.L. Johnson, in the 2000 general election. *Id.* Senator Walker believes that he can win re-election, but noted that his successor would have to be "well-financed, relatively trained and had some previous political experience." Walker Dep. 81:19-25-82:3.

G. Expert Testimony on Methodologies of Predicting Voting Patterns

The State of Georgia relied on a single expert, Dr. David Epstein, to attempt to meet its burden of proof on the State House, State Senate and United States Congressional redistricting plans. Epstein relies on a single methodology, probit analysis, for his conclusions as to all three plans. The United States' expert, Dr. Richard Engstrom, relied on three variations of regression analysis, while the intervenors' expert, Dr. Jonathan Katz, limited the scope of his report to a critique of Epstein's probit analysis. The court is struck by the narrow scope of Epstein and Engstrom's reports. Epstein's report addresses the limited question of what percentage of BVAP will produce a 50% chance that an African American candidate of choice will win election. Engstrom's report attempts to ascertain the degree of racially polarized voting in existing Senate Districts 2, 12 and 26. Neither report focuses its inquiry on the question of whether the proposed redistricting plans are retrogressive.

1. Probit Analysis

Plaintiff's expert report describes probit analysis as a standard statistical method for determining the likelihood of an event that has two possible outcomes. Epstein describes the method as a fitting tool to allow political scientists to determine the likelihood that an African American candidate of choice will win. There are only two possible outcomes with which the analysis is concerned—the candidate of choice wins or loses. Epstein's analysis is designed to predict the "point of equal opportunity," or the point at which the demographics of a district will result in a 50% chance that an African American candidate of choice will win election. The demographics of the district are represented by the percentage of BVAP, as calculated by Georgia. While it appears true that probit analysis is a standard statistical technique, no court has relied on such an analysis in reviewing a reapportionment plan.

Epstein's database includes 1,258 elections, all elections in the relevant legislative offices held since 1996. The database identifies the district in which an election was held, the district's BVAP at the time of the election, the race of the incumbent or whether the election was an open seat or special election, the race of the winner, and whether the winner was an African American candidate of choice.

Epstein proposes that an African American "candidate of choice" must necessarily be determined by some element other than race. Epstein defines a candidate of choice as any African American candidate who won election, or any white candidate who won election in a district with a majority BVAP and who received a majority of the African American votes cast.[28] Thus, the database of elections does not include

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[28] Epstein estimates the level of African American support for the white candidates by using a methodology called Dr. King's regression, or ecological inference, analysis. This methodology is discussed in more detail below.

any white candidates who received the majority of African American votes in districts with less than 50% BVAP, whether they won or lost. Tr., 2/4/02, p.m. at 44. Intervenors' expert, Dr. Katz contends that Epstein's definition of a candidate of choice is arbitrary. He suggests that a "more natural definition of candidate of choice would be to calculate district by district, using ecological inference techniques, which candidate receives the majority vote of Blacks." Int. Ex. 25 at 9.

Epstein's database includes election data from Congressional, Senate and House races. He predicts one "equal opportunity number" from this data, and does not perform separate analyses for the Congressional, Senate and House elections. In his report, he states that "as a matter of political and voting behavior, voting patterns on legislative races are generally similar from one body to another." Pl. Ex. 25 at 14. Epstein provides no explanation or justification for this conclusion other than his opinion that the more elections are in the database, the better. While a footnote to Epstein's statement suggests that racial voting patterns throughout Georgia are "sufficiently similar" to warrant the combination of election results in the database, on cross-examination Epstein clarified that this footnote referred to his conclusion that there was no need to perform regional analyses. *Id.* 14, n.11. Epstein testified that he reached this conclusion by comparing estimates of white crossover vote in the current Senate districts in three 1998 statewide races.

Epstein testified that, before he performed his probit analysis, he first determined that it was permissible to treat the State as a unified whole by evaluating white crossover

voting.[29] He uses the King methodology of ecological inference to analyze the precinct level voting patterns, and to estimate the percentage of white voters who "crossed over" to vote for African American candidates in each of the existing Senate Districts. U.S. Ex. 122. These estimates are based on data from three 1998 statewide general elections. *Id.* The average estimated white crossover voting in those districts ranges from 24.73% to 57.39%. *Id.* Epstein testified that he did not consider this range to be statistically significant because the crossover estimates were regularly distributed, and all but two "outliers" fell within the expected range. Epstein further testified that, after his first deposition, he expanded his analysis to look at black crossover voting and black registration levels as indicators of minority voter mobilization. Tr., 2/4/02, p.m. at 68-69. These additional analyses are not part of the record before the court. However, on redirect, Epstein testified that he got the "exact same result" when he ran these analyses, finding that black crossover and black registration levels were in a "tight distribution, " with "very few outliers." Tr., 2/5/02, a.m. at 98.

To reach his conclusions regarding the non-retrogressive effect of the proposed plans, Epstein relies only upon an analysis of open seat elections. The database includes only 158 open-seat elections. Epstein finds that the point of equal opportunity is 44.3% BVAP, which means that "there's a

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[29] The court again notes that, although this information appears to be crucial to the methodology employed by Epstein, it was not provided to defendants or intervenor-defendants until shortly before the beginning of the trial. Nevertheless, defendants thoroughly cross-examined Epstein about his calculations and his conclusion that the differences were not statistically significant.

The court also emphasizes that Epstein did not attempt to rely on the table's calculations to demonstrate voting patterns in the districts, and calculated crossover in the existing, and not the proposed, Senate districts. Tr., Day 1, p.m. at 71.

50-50 chance of electing a candidate of choice" in a district with an open seat and with 44.3% BVAP. Tr., 2/5/02, a.m. at 29; Pl. Ex. 25 at 17. Epstein explains this result by noting that over 90% of African American voters support Democrats, while over 60% of white voters support Republicans. *Id.* at 17, n.14. Thus, an African American supported candidate would usually be able to win a primary in a 44% BVAP district because African Americans would form the majority of Democratic voters, and the candidate would receive enough white Democratic crossover votes to win the district overall.

Epstein also considers the races of African American incumbents, but finds that a probit analysis is inappropriate for these races. Of the recent 200 races with an African American incumbent, only once was the African American incumbent defeated. Hildred Shumake lost in 1992; however, at the time of the election, Shumake was under indictment on extortion charges and suspended from the State Senate. African American incumbents have run in districts with as low as 35% BVAP and have won. Therefore, to assess the likelihood of an African American incumbent losing to a white candidate who was not a candidate of choice, Epstein combined the open seat data with the African American incumbent elections. This yielded an equal opportunity point of 37.4% BVAP.

The point at which an African American candidate has a 50% or greater chance of unseating a white incumbent occurs at 56.50% BVAP. Senate District 12 is currently represented by Senator Meyer Van Buren, a white man. The existing district has a 55.25% BVAP, which would be reduced to 50.66% BVAP under the proposed plan. Epstein testified that, according to his calculations, an African American candidate of choice would have less than a 50% chance of being elected in a district with 55.25% BVAP and a white incumbent; the estimated probability of an African American candidate of

choice being elected in a district with a white incumbent and 50.66 BVAP falls to approximately 29%-30%.

On the first day of trial, Epstein produced an "S curve," which had previously not been provided to the court or to opposing counsel. Pl. Ex. 109. He testified that the curve was not a necessary part of his analysis. Rather, he characterized it as a "visual aid" to explain the correlation of a district's BVAP with the probability that a minority preferred candidate would be elected. Tr., 2/5/02, a.m. at 15-16. The illustration is an "S curve or a probability curve representing the results of the probit analysis done for the open-seat races in [Epstein's] database." *Id.* at 18. The curve plots the probabilities that an African American candidate of choice will be elected at a given level of BVAP. This calculation is based on a formula that assumes normal probability distribution of the existing data points. *Id.* at 23.

Epstein testified that, in a district with 50% BVAP, there is a 75% probability that an African American candidate of choice will be elected. Thus, in districts with BVAPs between 44% and 50%, Epstein's calculations show that the probability that an African American candidate of choice will be elected increases from 50% to 75%, representing a steep increase in the curve. Tr., 2/5/02, a.m. at 29. Epstein further testified that a "cumulative, normal curve[]," "by definition," "is steepest right at its midpoint." *Id.* at 30.

The proposed Senate plan includes six districts, in which the BVAP is between 50.3% and 51.5%. Estimates for these districts, therefore, would be in the "steepest" portion of the curve. Given the absence of tick marks on the axes or plotted data points, nothing in the record permits the court to know what corresponding probabilities Epstein would assign to these districts. However, the probabilities would presumably all be higher than 75%, the probability Epstein correlates with 50% BVAP.

There are very few elections in Epstein's database that fall along the steep part of the S curve. In only two of the 158 open-seat elections does Epstein indicate that an African American candidate of choice was elected in a district with less than 53% BVAP. Pl. Ex. 25, app. II (Cong. Dist. 4; House Dist. 89). Of the 158 open-seat election data included in the database, only thirty-six of them represent elections in districts with BVAPs of 30%-70%. According to Epstein's database, eight elections took place in districts with BVAPs of 31%-36%, only one of which resulted in the election of a candidate of choice. After having served as a Congressional Representative, Cynthia McKinney was elected in a redrawn Congressional District that had 33% BVAP.

Epstein's open seat database contains ten elections in districts with BVAPs of 49%-54%: five were won by candidates of choice, four were not won by candidates of choice and one was indeterminate.[30] There are 18 districts with BVAPs of 56%-68%, all of which elected candidates of choice.

Epstein admits that it would be preferable to have data points in the steepest region, but states that political scientists often do not have all the data that they would desire. Tr., 2/4/02, p.m. at 31. Georgia, in its Post-Trial Brief, argues that the absence of such data points can not reflect poorly on its case and, in fact, the absence of such points is the result of previous unconstitutional, race-based policies of the Department of Justice. Post-Tr. Br. at 9; PPFF P 294.

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[30] Specifically, one African American candidate of choice was elected at 53% BVAP, and four candidates of choice were elected at 54% BVAP. Candidates of choice were not elected at 49% BVAP, 50.0% BVAP, 53% BVAP, 53.5% BVAP and an indeterminate result was found for a district with 52.28% BVAP. Pl. Ex. 25, app. II.

There are no districts in the database between 36% and 49% BVAP, and no districts in the database between 54 and 56% BVAP.

Intervenors' expert, Dr. Katz, suggests that Epstein should have identified a margin of error to be applied to his estimates. Int. Ex. 25 at 9. Epstein states that his data are normally distributed, and that the statistical accuracy of the probit analysis is demonstrated by the fact that the curve represents over 80% of his data. However, the United States suggests that, due to the large number of elections in the open seat database in districts with high and low percentages of BVAP, an explanation of 80% of the data does not prove the accuracy of Epstein's estimates at the steepest part of the curve.

The United States argues that probit analysis is extremely sensitive to even single data points. In cross-examination, defendants focused on Epstein's coding of Cynthia McKinney's victory in the Fourth Congressional District as a race for an open seat. McKinney's district was redrawn in 1996, and the proposed district in which she ran retained approximately a third of her constituents.[31] Epstein testified that, had he taken McKinney's race out of his "open-seat" database, his point of equal opportunity would rise by approximately two points. Tr., 2/5/02, a.m. at 43. Thus, the removal of one race would cause his estimation of the point at which an African American candidate of choice has a 50% chance of winning election would rise from 44% to 46%.

Epstein's analysis of whether the reapportionment plans will retrogress consists of comparing the number of majority BVAP districts under the benchmark and proposed plans, and comparing the number of districts under the benchmark and

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[31] Epstein stated that "with the McKinney election, . . . there's a coding rule at issue, and so I think it's appropriate to do some analysis on whether or not that's a crucial coding issue." Tr., 2/5/02, a.m. at 43. It does not appear, however, that he performed this analysis, and there is no testimony in the record as to what constitutes a "crucial coding issue." *Id.*

proposed plans that have BVAPs greater than 44.3%. His results are represented in the following table.

	Standard	Benchmark	Proposed
House	Equal Opportunity	41	44
	Majority-Minority	37	39
Senate	Equal Opportunity	13	13
	Majority-Minority	12	13
Congress	Equal Opportunity	2	2
	Majority-Minority	1	2

Pl. Ex. 25 at 18.

Epstein, without explanation, used the "equal opportunity" point for open seat districts to do this comparison. According to the results of his analysis, a redrawn district with a white incumbent would need to have 56.5% BVAP in order for an African American candidate of choice to have a 50% chance of being elected.

There are six districts in the proposed senate plan where BVAP is between 50.3% and 51.5%. Epstein does not consider the effect of reducing BVAPs in majority-minority districts to bare majorities.

Intervenors' expert also notes that Epstein's data reflects only elections in single-member districts. Int. Ex. 25 at 11. Epstein does not explain whether his analysis is applicable to the proposed multi-member districts created in the State House. *Id.* In the proposed House plan, there are 124 single-member districts, 15 districts with two members, 6 districts with 3 members and 2 districts with four members. Epstein merely counts the number of seats in the proposed multi-member districts for purposes of his comparison of the number majority-minority seats under the proposed and benchmark plans.

2. Engstrom's Use of Ecological Regression Analysis to Assess Racially Polarized Voting

The Supreme Court has relied on regression analysis to assess the severity of racial bloc voting and whether existing voting patterns would prohibit a minority population from electing candidates of choice. *See, e.g., Thornburg v. Gingles*, 478 U.S. 30, 52-53, 92 L. Ed. 2d 25, 106 S. Ct. 2752 (1986). This regression analysis is also referred to as "ecological inference" methodology, and allows political scientists to infer voting behavior from aggregate information. Engstrom employs three types of regression analysis: ecological inference, King's ecological inference[32] and homogeneous precinct analysis.[33]

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[32] Ecological regression analysis provides an estimate of the support for various candidates among both African American and non-African American voters based on statistically significant correlations between voters' race and voting patterns. One court described ecological regression as a standard statistical technique that "compare[s] the votes a candidate received in an election with the racial composition of the electorate, and produce[s] estimates of the voting behavior of [minority voters] and white voters." *Old Person v. Cooney*, 230 F.3d 1113, 1123 (9th Cir. 2000).

The "King ecological inference" approach is a technique developed in 1997, which uses all available data to generate a more accurate estimate of voting behavior. Epstein testified that a scholarly article recently predicted that the King method of ecological regression improves upon traditional methods by approximately 16%, thus getting "closer to the truth," but not solving the inherent aggregation bias problem. Tr., 2/5/02, a.m. at 106. Aggregation bias is a problem that arises from attempting to infer individual voting behavior from aggregate-level behavior, or, in other words, in predicting how voters of different races voted in an election by looking at a precinct's demographic characteristics and data such as voter turn-out.

[33] A homogeneous precinct analysis considers the election results from precincts that are closest to racially homogeneous in character. For example, the analysis generally reports the percentage of the votes a candidate or set of candidates receive within the precincts in which over

The United States' expert report, submitted by Engstrom, clearly describes racially polarized voting patterns in Senate Districts 2, 12 and 26. U.S. Ex. 601. However, in the report submitted with the government's direct testimony, Engstrom does not attempt to predict the effect of this polarized voting on the ability of minority voters to elect candidates of their choice under the proposed redistricting plans.

Engstrom's report analyzes the extent to which the candidate preferences of African American and non-African American voters within Georgia State Senate districts 2, 12 and 26 have differed in recent elections, in which they were presented with a choice between African American and non-African American candidates. *Id.* at 2. Engstrom reviews voting statistics from five elections for State Senate seats. These include, in Senate District 2, the 1999 special election, the 2000 special runoff election, and the 2000 general election; and, in Senate District 12, the 1996 and 1998 Democratic primary elections. *Id.* at 2-3. In addition, Engstrom reviews voting patterns in the three senate districts in seven biracial statewide elections. *Id.* at 3. These elections include the 1998 democratic primary for Insurance Commissioner and Labor Commissioner, the 1998 runoff Democratic primary for Labor Commissioner, the 1998 general election for Insurance and Labor Commissioners, as well as for Attorney General, and the 2000 Democratic primary for Public Service Commissioner. *Id.* Engstrom also analyzes data from three biracial countywide elections from the predominant counties within each of the Senate districts, and from four biracial citywide elections from the largest cities within these counties. *Id.* Specifically, Engstrom analyzed Savannah city elections for Senate District 2, Bibb County and Macon City elections for Senate District 26, and elections from Albany

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90% of the registered voters or people receiving ballots was not African American and within those in which over 90% was African American.

City, Dougherty County and the existing House Districts 161 and 162 for Senate District 12. *Id.* at Tables 1-3.

Engstrom's analysis of the elections involving Regina Thomas in Senate District 2 demonstrates the effect of racially polarized voting and the minimal amount of so-called "white crossover." In the 1999 special election, there were four African American candidates, and two white candidates. While 80% [34] of African Americans voted for one of the four African American candidates, only 20.4% of non-African Americans voted for one of the four candidates. *Id.* at Table 1. In the special runoff between Regina Thomas, an African American candidate, and a white candidate, Thomas received 78.8% of the African American vote, while she received an estimated 8.9% of the non-African American vote. *Id.* In the 2000 election, Thomas is estimated to have received 99.2% of the African American vote and 43.6% of the non-African American vote. *Id.*

Senate District 12 currently has 55% BVAP and 52.5% African American voter registration in November 2000. *Id.* at 8. John White, an African American candidate, has twice won and lost against a white opponent in the Democratic primary. *Id.* at 8-9. He lost in 1996, with approximately 65% of African Americans supporting him, and approximately 10% of non-African Americans supporting him. *Id.* at Table 2. In 1998, he received 90% of African American votes and 17.5% of non-African Americans votes. *Id.* He lost, winning only 48.6% of all votes. *Id.* at 9.

In Senate District 26, no bi-racial elections have occurred since the 1996 redistricting. *Id.* at 10. Bibb County, which

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[34] Engstrom reports predicted voting patterns as calculated by regression analysis, King's ecological inference, and homogeneous precinct analysis. Engstrom, however, testified that King's ecological inference is generally considered to be the most accurate method of calculation, and the court will therefore refer to these estimates.

appears to be within the proposed Senate District 26, had bi-racial elections for its Board of Education, and for the Democratic primaries for District Attorney and County Commissioner. *Id.* at Table 3. In the two Board of Education races, the African American candidates received 99.5% and 99.3% of the African American vote, and 34.2% of the non-African American vote. *Id.* In the primary for District Attorney, the African American candidate received 68.4% of the African American vote, and 16.6% of the non-African American vote. *Id.* In the Democratic primary for Chair of the Bibb County Commission, an African American candidate received 64.8% of African American votes and 2.7% of non-African American votes. *Id.*

In none of the municipal or county elections analyzed by Engstrom did the preferences of African American voters and non-African American voters coincide. Engstrom concludes that his analysis of the three districts in question "reveal a pattern of racially polarized voting in these areas." *Id.* at 11.

Engstrom attempts to simulate the voting patterns of the proposed Senate districts. In order to do this, he considers precinct-level information from seven statewide races between African American and white candidates, "reaggregating" the data to reflect the contours of the three proposed districts. *Id.* In the seven hypothetical elections in the reaggregated districts, an African American candidate lost only once in one reaggregated district. *Id.* at Table 4. On cross-examination, Engstrom testified that there would be a "very good chance" that, based on the voting patterns revealed by his reaggregation analysis, African American candidates would win election in the reconstituted districts. Tr., 2/5/02, p.m. at 88. However, he concludes that his reaggregation results were "not a good indication that these proposed districts will provide African American voters with a realistic opportunity to elect representatives of their choice, given that

the level of crossover voting tends to be considerably higher in these elections than in the senate and other elections involving local candidates." U.S. Ex. 601 at 12. Engstrom emphasizes that African American candidates consistently received less crossover voting in local election than in statewide elections. *Id.*

Engstrom further justifies his conclusion that the local election analysis was more probative than his reaggregation analysis by describing a second reaggregation analysis he performed. When Engstrom reaggregated the statewide election data to reflect the *existing* Senate Districts, he found that African American candidates were supported at similar levels as those reflected in Table 4 of his report. Tr., 2/5/02, p.m. at 91. However, he noted that, in the existing Senate District 2, Ms. Thomas barely won her runoff election in 1999, by some 73 votes, and that, in the existing District 12, Mr. White had not succeeded in 1996 or 1998. *Id.* Thus, he concluded that reality did not reflect the favorable prediction of the reaggregation analysis.

III. Conclusions of Law

The court has jurisdiction to hear this case pursuant to 42 U.S.C. § 1973c; 28 U.S.C. § 1346(a)(2); 28 U.S.C. § 2201. This court is properly convened as a three-judge court pursuant to 42 U.S.C. § 1973c and 28 U.S.C. § 2284. None of the parties contests the applicability of Section 5 to this matter.

The State of Georgia is a covered jurisdiction as defined under Section 5 of the Voting Rights Act of 1965, as amended. 42 U.S.C. § 1973c; 28 C.F.R. § 51 (Appendix). Section 5 applies to any changes in voting processes in Georgia, and mandates that the State receive preclearance prior to instituting any such changes. *Georgia v. United States*, 411 U.S. 526, 527-28, 93 S. Ct. 1702, 36 L. Ed. 2d 472 (1973). The reapportionment of seats in Georgia's Congressional delegation and General Assembly seats for the

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that a candidate of choice would be elected. However, a similar decline in BVAP would not have the same effect if the overall BVAPs were higher. Thus, in Senate District 10, where the proposed plan would decrease BVAP by 6.52%, reducing BVAP from 69.72% to 63.42%, Epstein's "S curve" indicates that this would reduce only slightly the probability of electing an African American preferred candidate. Unfortunately, it is impossible to read Epstein's curve in any accurate fashion, and his expert report provides no additional guidance or information.[37] Nevertheless, the court does find Epstein's testimony relevant insofar as it suggests that decreases in BVAP within the ranges proposed in the contested Senate districts may have a significant (if inadequately quantified) negative impact on the likelihood that African American voters will be able to elect their candidates of choice.

b. Underpopulation of Existing Senate Districts

The benchmark plan for Section 5 purposes is the last legally enforceable plan, which in this case is Georgia's existing Senate plan. *Abrams v. Johnson*, 521 U.S. 74, 97, 117 S. Ct. 1925, 1939, 138 L. Ed. 2d 285 (1997). Georgia argues that the demographics of the existing plan do not represent a fair basis for comparison because, in light of the 2000 census, the districts at issue are all underpopulated, and thus in violation of the principles of one person-one vote. *See Wesberry v. Sanders*, 376 U.S. 1, 84 S. Ct. 526, 11 L. Ed. 2d 481 (1964) (holding unconstitutional gross disparities of population across Georgia congressional districts and the resulting dilution of voting rights of residents of the more populous districts).

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[37] On redirect, Epstein relied on his S-curve to testify that, in District 43, with 65.18% BVAP, he estimated the probability at 90% to 95%; in district 48, with 61.13%, he estimated probability at approximately 95%. Tr., 2/5/02, a.m. at 84.

The State contends that, where population had to be added to districts, it was inevitable that their BVAP levels would decrease. *See, e.g.*, PPFF at P 621 ("While the BVAP levels in the majority-minority district have decreased, that was inevitable as a result of the fact that those districts where generally short of population. This is particularly true with regard to the three districts with which Defendants have taken issue."). Georgia suggests that this alleged quandary insulates its plan from a section 5 challenge. *See* Pl. Post-Tr. Br. at 47-48. This argument is unavailing. First, even if the State is correct that some reductions in BVAP were inevitable—a proposition that it asserts without attempting to prove—it certainly does not follow that Georgia was compelled to move minorities out of Districts 2, 12, and 26 to the extent that it did. Indeed, the State actually removed some majority African American precincts from each of these districts, a decision that at least casts doubt on its cries of inevitability.[38]

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[38] The following table shows the percentages of black registered voters residing in the precincts that were moved out of the proposed districts, and those that were added to the districts.

SD	Deviation	Reg. voters moved out	Black reg % of removed precincts	Reg. votes added	Black reg., % of added precincts	Net add. of reg. voters	Black reg. voters, % of net add. reg. voter
2	-24.37%	7,835/8,626 (approx. 42% of total added voters)	20.39% 21.83% *	23,225 24,465 *	14.97% 15.89% *	18,866 17,533 *	12.86% 11.8% *
12	-17.77%	10,705 (approx. 91% of total added voters)	46.64%	17,228	30.28%	9,928	18.25%

While the precincts added to the proposed districts also contain significant African American communities, the overall effect of the reapportionment is to reduce the percentages of BVAP in these districts.

As the United States has illustrated, there were alternative plans available that would both have comported with the constitutional principle of one person-one vote and have allowed the retention of greater numbers of African American voters in the disputed districts. *See* U.S. Exs. 213-23; 313-18; 414-19. For example, in Senate District 2, the United States notes that Hunter Army Air Field was removed from the proposed district. The inclusion of the army base would have permitted the district, which was in need of population, to add population while avoiding a reduction in BVAP. *See* U.S. Ex. 733, 192: 1-14 (Meggers' testimony); USPFF PP 214-15.

Moreover, the State, despite its suggestion to the contrary, was not forced to choose between complying with the Equal Protections Clause and the Voting Rights Act. It is true that the dictates of one person-one vote may at times force a redistricting state to reduce the minority population in a district that previously was strongly majority-minority. However, the mere fact that BVAP decreases in certain districts is not enough to deny preclearance to a plan under Section 5: Instead, retrogression concerns are implicated when it appears that the numerical changes may diminish effective minority voting power. A State is free under Section 5 to reduce BVAP

26	-28.65%	14,047 (approx. 54% of total added voters)	41.80%	33,202 30,484 *	20.20%	23,295 19,678 *	11.0% 13.09% *

USPFF at PP 181, 326, 380; Pl.'s Resp. to PP 181, 326, 380.

* Plaintiff's responses present different calculations. These are marked with an asterisk.

levels in a district in order to bring that district into compliance with the Fourteenth Amendment, so long as in so doing it does not limit the ability of the remaining minority voters to elect candidates of choice. *Cf. Bush*, 517 U.S. at 982-83, 116 S. Ct. 1963 (suggesting exception when no feasible alternative plan exists). Read in this way, the Voting Rights Act continues to serve its historical purpose of protecting minorities in the exercise of their electoral franchise without running afoul of the Constitution's overarching demand of equality.

c. Evidence of Racial Voting Patterns

Racially polarized voting "exists where there is a consistent relationship between the race of the voter and the way in which the voter votes." *Gingles*, 478 U.S. at 54 n.21. Recognizing that "there is no simple doctrinal test for the existence of legally significant racial bloc voting," *Gingles* noted that Section 2 inquiries are necessarily fact-sensitive. *Id.* at 58. Justice Brennen suggested a number of factors that courts may consider under Section 2.

> [A] white bloc vote that normally will defeat the combined strength of minority support plus white "crossover" votes rises to the level of legally significant white bloc voting. The amount of white bloc voting that can generally "minimize or cancel" black voters' ability to elect representatives of their choice, however, will vary from district to district according to a number of factors, including the nature of the allegedly dilutive electoral mechanism; the presence or absence of other potentially dilutive electoral device . . .; the percentage of registered voters in the district who are members of the minority group; [and] the size of the district.

478 U.S. at 56. As explained above, in the present case, racial polarization is critically important because its presence or absence in the Senate Districts challenged by the United

States goes a long way to determining whether or not the decreases in BVAP and African American voter registration in those districts are likely to produce retrogressive effects.

Georgia's own expert demonstrated that, given some varying amounts of racial polarization and crossover voting, minority voters' ability to elect candidates of choice is likely to decrease as districts' BVAP diminishes. Epstein's probit analysis necessarily subsumes information about racial voting patterns and voter turnout.[39] Whether an African American candidate of choice wins election is necessarily determined by the degree of racial bloc voting by African American voters and the level of white crossover votes received by the candidate. However, it is impossible to extrapolate these voting patterns from Epstein's database. As Epstein admitted on cross-examination:

> the whole point of my analysis is not to look at polarization per se. The question is not whether or not blacks and whites in general vote for different candidates.

Tr., 2/4/02, p.m. at 44-45.

Although not drawing any legal conclusions, Epstein testified that, in order to assess whether there has been retrogression in the voting rights of people who live in a reconfigured district, it would be necessary to consider whether the district was "significantly different" than the rest of the State. Tr., 2/5/02, a.m. at 70. Epstein also admitted that,

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[39] Epstein testified: "the great advantage of using probit analysis here, is, I'm not concerned with trying to figure out whether or not black candidates are getting elected via greater turnout, crossover, registration, . . . campaign appeals. Those all might be there and they're important, but if all you want to do is . . . estimate something on the level of district characteristics, then you're using estimated district characteristics. . . . I'm looking at the different kinds of districts, see who elected a black candidate of choice and who didn't." Tr., 2/5/02, a.m. at 108-09.

in his opinion, a candidate running for office in a particular district would want to take into account whether white crossover was at 25% or at 52%. *Id.* at 72. It is inevitable that there will be "local variability" in elections. In fact, Epstein notes that his "final conclusion . . . is not that there is no difference . . . from one area to another." *Id.*

Epstein did not perform any ecological regression analyses of voting patterns in Senate Districts 2 or 26. Epstein did, however, perform an ecological regression analysis for an election in Senate District 12. In the 1998 Senate election, he found that the winning white candidate was not the African American candidate of choice, and, in fact, received very little black support. Tr., 2/4/02, p.m. at 50. He testified that, to his recollection, the ecological regression analysis had shown "very high levels of polarization" in that election. *Id.*

Thus, with the exception of Epstein's analysis of one election in Senate District 12, the only evidence of racially polarized voting before the court is Engstrom's expert report. The report provides the results of two different methodologies of analyzing racial voting patterns in Senate Districts 2, 12, and 26. Engstrom considered local elections to assess the "extent of racial voting correlations" in the existing district. Tr., 2/5/02, p.m. at 12. He also performed a reaggregation analysis, which gathered precinct-level results from seven statewide elections between an African American candidate and a white candidate and predicted results for the proposed Senate Districts. The results of Engstrom's analysis are discussed at length in the court's Findings of Fact.

The State would use Engstrom's reaggregation analysis to prove its case. The State argues that the reaggregation analysis is the only record evidence that attempts to estimate voting patterns in the proposed districts. By Engstrom's own admission, the reaggregation results suggest the presence of sufficient white crossover voting to permit some African American candidates of choice to prevail in the redrawn

districts. Furthermore, Engstrom can only guess at the reasons for the different voting patterns in statewide and local elections. However, we find that Engstrom has presented compelling evidence that racial voting patterns in State Senate races can be expected to differ from racial voting patterns in statewide races.

Before discussing Engstrom's analysis of voting patterns in local elections, we must first address some concerns with the relevance of this analysis. Plaintiff underscores the absence of any information in Engstrom's report that would identify the overlap of the jurisdictions in which the local elections analyzed by Engstrom took place and the proposed Senate Districts. Pl. Post-Tr. Br. at 15; *see also* Tr., 2/5/02, p.m. at 20. Although the court is ultimately unable to determine the exact extent of overlap present, it is clear that a substantial portion of the jurisdictions considered by Engstrom will fall within the proposed Senate Districts.

Engstrom did not attempt to compare the proposed plan with the benchmark plan, Tr., 2/5/02, p.m. at 70, and, in fact, looked only at racial polarization in existing Senate Districts. In its Post-Trial Brief, the United States, without citing to any record evidence, states that "the county elections analyzed involve counties that make up the overwhelming majority of all three districts at issue." U.S. Post-Trial Br. at 96. The court has searched the record and found evidence describing the overlap of the existing and proposed Senate Districts,[40] as well as overlap of the existing and proposed Senate Districts.[41] However, Engstrom looked at city elections for

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[40] 65.39% of the proposed Senate District 2 is comprised of the population from the existing District 2. U.S. Ex. 112. 72.68% of the proposed Senate District 12 is comprised of the population from the existing District 12. *Id.*

[41] The United States introduced a listing of counties included in the proposed Senate Districts. This listing indicates that Dougherty County is

Savannah, Macon and Albany, and there is no evidence in the record that would assist the court in determining these cities' limits. Engstrom also considered two State House races, but, again, no record evidence permits the court to compare the geographical reach of the House Districts to the proposed Senate Districts.

These gaps in the record do not require the court to disregard the local election data and analysis provided by Engstrom. It is clear that a substantial portion of the benchmark Senate Districts and Bibb County comprise the proposed districts. Furthermore, the State has not denied the United States' assertion that the county and city elections analyzed involve a majority of the voters in the benchmark and proposed districts at issue. Ultimately, the burden of proof in this matter lies with the State. We look to the State to explain why retrogression is not present, and to prove the absence of racially polarized voting that might diminish African American voting strength in light of several districts' decreased BVAPs. We find that Engstrom's report presents relevant information, and indicates that Senate elections in the redrawn districts will be marked by high levels of polarized voting. Plaintiff has presented no evidence to suggest otherwise.[42]

The State's primary critique of Engstrom's report posits that his analysis of racial polarization is flawed because it only considers the level of white crossover voting.[43] The State

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split between the proposed Senate Districts 12, 13, and 14. U.S. Ex. 111. In contrast, Bibb County appears to be wholly located within the proposed Senate District 26. *Id.*

[42] To the extent that African American legislators testified that they believe candidates of choice could be elected under the proposed plan, they did not suggest that racially polarized voting did not exist in Georgia.

[43] The State advances two additional arguments, which we address only briefly. Plaintiff argues that Engstrom's analysis is flawed because he failed to consider the outcomes of the elections included in his report. The

argues that a better indicator of racial polarization is the difference of votes received from African American and non-African American voters. *See* Pl.'s Resp. to USPFF P 426 (arguing that, "in looking at the actual *difference* of issue, it is apparent that the patterns in the statewide elections was [sic] indistinguishable from that in the local elections"). For example, instead of focusing on Engstrom's estimate that Senator Thomas received 78.8% of African American votes in District 2, the State suggests that the difference between that number and the level of white crossover voting for Thomas (8.9%), is a more accurate reflection of race-based voting patterns.

Georgia relies on its analysis of "preference differentials" to suggest that the regression analyses done by Engstrom on the local election data demonstrate the same pattern as does

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State belabors the point that several of the African American candidates in races, in which Engstrom finds racially polarized voting, were elected. However, plaintiff offered no testimony that would persuade this court that these candidates' victories disprove the existence of racially polarized voting. Rather, Engstrom testified that the fact that an African American candidate won in the general election would not change any of his opinions with respect to the levels of racially polarized voting. Tr., 2/5/02, p.m. at 86-87. He further explained that the victories were typically in majority-minority jurisdictions. *Id.* Contrary to the suggestion of our dissenting colleague, the court in no way considers electoral victories by African American candidates to be aberrations; rather, the court can conclude only that, given specific demographics and voting patterns, African American candidates of choice may win election *despite* racially polarized voting.

The State of Georgia also argues that Engstrom's report does not take into account the level of African American voter turn-out at Democratic primaries. Plaintiff's contention appears to rest on the theory that, if African American voters generally participate in Democratic Party primaries at a higher rate than other voters, they are able to influence the outcome of the primaries, and that the Democratic candidate was likely to win in the general election. However, there is no reliable record evidence concerning voter turn-out, at primaries or at general elections.

his reaggregation analysis of statewide elections. Georgia identifies the range of the differences in support in Engstrom's local election data, and posits that this range corresponds to the range seen in the reaggregation results. Georgia asks the court to conclude that the similarity of "ranges" demonstrates that the level of racial polarization is the same in local elections as it is in elections for statewide office. The next step in this logic, according to the State, is to credit Table 4 over Tables 1-3, and to conclude that African American candidates have "good chances" of winning election. Tr., 2/5/02, p.m. at 89 (Engstrom admits that reaggregation results show a "good chance" of African American candidate winning).

It is fanciful to think that the court will defer to counsel's alternative "expert" theories. No expert testimony has been presented to suggest that comparing "ranges" of numbers will result in probative evidence. For example, the court does not see why a comparison of the ranges of the relative support levels is necessarily any more probative than a comparison of the average levels of the differences in support.[44] The court is

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[44] *By way of illustration only*, the court provides the following calculations of average differences in support for African American preferred candidates in those elections listed by Engstrom in Senate Districts 2 and 26, and in Bibb County, which appears to be primarily, if not totally, within District 12.

Average difference in percentages of African American and Non-African American Support for African American Preferred Candidates

District 2		District 12		District 26	
Senate 2 elections	Statewide elections	Senate 12 elections (primaries)	Statewide elections	Bibb County elections	Statewide elections
63.58%	45.99%	63.05%	28.43%	55.72%	40.2%

The differentials are based on the King Ecological Inference numbers contained in Engstrom's Tables 1-3.

not persuaded that the method of comparing the ranges of the differentials suggested by plaintiff's counsel is at all probative. While open to the contention that the difference in levels of white and African American voter support may be probative of the degree of racial polarization, the court sees no way that it may competently interpret this information in the absence of expert evidence to this effect.

In light of the problems with the State's own statistical evidence and its inability to cast significant doubt on that presented by the United States, we are compelled to conclude that the evidence of racial polarization suggests the likelihood of retrogression. Indeed, despite the importance of such information to the Section 5 inquiry, plaintiff has provided the court with no competent, comprehensive information regarding white crossover voting or levels of polarization in individual districts across the State. At the same time, the United States has produced credible evidence that suggests the existence of highly racially polarized voting in the proposed districts. As emphasized above, an African American candidate's ability to succeed in a jurisdiction will depend on the levels of polarization and white crossover voting. Engstrom's testimony suggests that Senate races in the proposed districts will be marked by racially polarized voting. This evidence undermines the utility of Epstein's probit analysis because that analysis fails to account for variations in levels of racial polarization. And plaintiff has presented no other evidence to persuade us that voting in future Senate races in the contested districts will not be racially polarized. Consequently, the court can not find by a preponderance of the evidence that the planned reductions in BVAP and in the number of African American registered voters in Senate Districts 2, 12 and 26 will not diminish African American voting strength in these districts. Once again, we note that it may well be the case that any decrease in African American electoral power in Senate Districts 2, 12

and 26 will be offset by gains in other districts, but plaintiff has failed to present any such evidence.

d. Lay Testimony

The electoral history of the jurisdiction may shed considerable light on the effects that reapportionment will have on minority voting strength. One part of that electoral history is found in racial voting patterns and the willingness of voters to cast ballots for candidates of different races. Lay witness testimony regarding the use of race in politics and elections is also relevant.

The court is presented with two types of lay testimony regarding the electoral climate of the disputed districts and the State in general: (1) testimony by legislators and others involved in the drafting of the reapportionment plan; and (2) testimony by legislators and citizens providing opinions about minority voting strength.

African American Legislators' Support of Redistricting Plan

The State relies heavily on the unanimity of African American legislators' support for the reapportionment plan to argue that the plan does not have a retrogressive effect. Plaintiff characterizes as "indisputable" the proposition that African American elected representatives are in the best position to judge "as a matter of fact" whether the reapportionment plans enhance or diminish minority voting strength. PPFF P 618. The court, however, notes that the United States has presented extensive evidence of African American Senators' misgivings about the Senate plan. Nevertheless, only two African American legislators voted against the plan. The court will not look behind those votes to question such inherently political decisions. A vote for legislation is almost always a compromise of some sort, motivated by a complex intersection of self-interest and external pressures. A court that tries to unpack these forces, and assign probative weight to them, treads a treacherous path. Accordingly, we are loathe

to rely on testimony regarding the nature of legislative trade-offs, or on post-hoc expressions of doubt on the part of legislators who nevertheless voted for the contested plan. Certainly, as it relates to the plan's possible retrogressive effect, this is dubious evidence indeed.

That said, it is undoubtedly true that support among minority legislators for a reapportionment plan can sometimes be relevant in assessing the legality of that plan under the Voting Rights Act:

> The protection of existing relationships among incumbents and their constituents, and the benefits accruing to the state from the seniority its delegation may have achieved in Congress, are pragmatic considerations which often figure prominently in the drawing of congressional districts. These considerations are not talismanic, however, and may not serve to protect incumbents by imposing an electoral scheme which splinters a geographically concentrated black populace within a racially polarized parish, thus minimizing the black citizenry's electoral participation.

Major v. Treen, 574 F. Supp. 325, 355 (E.D. La. 1983). In this case, the State has presented no authority suggesting why the court should consider the support of African American legislators as evidence that the actual effect of the Senate redistricting plan will not be to decrease minority voters' opportunities to elect candidates of choice. We believe that the legislators' support is, in the end, far more probative of a lack of retrogressive purpose than of an absence of retrogressive *effect*.

Voting Patterns in Senate Districts 2, 12 and 26

The record is replete with lay testimony regarding individuals' predictions as to whether the redrawn districts will permit minority voters to elect candidates of choice. Several incumbent Senators testified that they believed the plan gave

them and others a "fair" or "reasonable" chance of victory in the redrawn districts. *See, e.g.*, Brown dep. at 30, Walker dep. at 12. However, Senator Fort expressed concerns that the plans might be retrogressive. Int. Ex. 16 at 3.

The United States has offered the testimony of eleven witnesses from Chatham County with respect to the proposed Senate District 2, including two State Senators, four African American Commissioners, and three members of the Executive Committee of the Savannah Branch of the NAACP. They testified that they believe the boundaries of Proposed Senate District 2 will reduce the opportunity that African American voters have, under the benchmark Senate District 2, to elect candidates of choice. USPFF at P 187.

Dr. Jackson, President of the Savannah Branch of the NAACP, sent a letter to the Governor of Georgia on August 6, 2001, expressing his opposition to the proposed changes, and suggesting that they "would serve only to dilute the Black votes and eventually delete the Black Legislators in this area." U.S. Ex. 504, P 23; U.S. Ex. 504, PP 10, 24 (NAACP executive member testifying that proposed districts would weaken minority voting strength); U.S. Ex. 509, P 10 (same). The city aldermen expressed similar concerns that the opportunities for African American voters to elect candidates of choice will diminish. U.S. Ex. 501, P 5; U.S. Ex. 505, P 5; U.S. Ex. 502, P 16.

Two witnesses from Senate District 2 testified that African American voter registration rate is lower than the white voter registration rate in Chatham Count, leading to a majority of white registered voters, despite a majority African American population. U.S. Ex. 503 P 6; U.S. Ex. 716, 11:25-13:11; 21:9-22:3; 25:19-26:5 (Jackson, NAAPC); U.S. Ex. 719, 66:3-21 (Rivers, Chatham County Bd. Comm.). Furthermore, seven of the witnesses, including NAACP Executive members, County Commissioners, Aldermen and Senator Thomas, testified that

white voter turnout is generally higher than African American voter turnout in Chatham County.[45]

Ms. Thomas notes that, in her experience, her white opponents have always won majority white precincts. U.S. Ex. 704, 104:11-19 (Thomas). Other witnesses from Chatham County testified to high levels of polarized voting, i.e. that voters cast their ballots for candidates of the same race as themselves. One NAACP member, who worked at a television station, testified that the staff routinely relied upon polarized voting patterns to predict election results from precincts that had not reported their returns. U.S. Ex. 504, P 6 (Johnson). Another witness testified to the use of racial appeals to white voters in the 1995 Savannah mayoral election and the 1999 Savannah municipal election. USPFF PP 210, 211; U.S. Ex. 712 (Alderman Jackson) (stating that white opponent labeled Alderman Jackson a "Farrakan supporter").

With respect to Senate District 12, the United States offers the testimony of five African American declarants, one former and two current City Commissioners, a former Representative to the State House, and the former president of Dougherty County NAACP. Two of the witnesses, Mr. John White and Mr. Charles Sherrod, ran for the Senate District 12 seat.

City Commissioners Williams and White testified that they felt the flier distributed by White's white opponent, Mark Taylor, in the course of the 1996 Democratic Party primary, was an attempt to encourage white voters to vote against

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[45] *See, e.g.*, U.S. Ex. 704, 104:11-19 (Senator Thomas); U.S. Ex. 716, 22:4-24 (Dr. Jackson, NAACP); U.S. Ex. 708, 65:7-14, 68:1-11 (Johnson, NAACP); U.S. Ex. 505 P 9; U.S. Ex. 709, 35:5-20; 36:2-7; 63:17-65:4 (Alderman Jones); U.S. Ex. 712, 53:20-54:5 (Alderman Jackson); U.S. Ex. 507 P 12; U.S. Ex. 717, 22:20-25:8, 27:23-28:15 (County Bd. Comm. Odell); U.S. Ex. 719, 66:24-67:3 (County Bd. Comm. Rivers).

African American candidates. U.S. Ex. 513 P 12. The flier compared White to Williams, who was outspoken on issues of city contracts with black-owned businesses, affirmative action in city government and affordable housing, and urged people not to vote in the Republican Party primary, but to vote against White in the Democratic Party primary. *Id.* White characterized the flier as "a call to arms for white voters to rally together to defeat a black candidate." U.S. Ex. 513 P 12.

The United States' lay witness evidence from Senate District 26 does not paint a picture of such a racially charged political environment, as is suggested by the lay testimony about Senate Districts 2 and 12. Senator Robert Brown is the incumbent and has been reelected without opposition three times, and once without opposition in the general election. Most witnesses believed that incumbent Senator Brown would be re-elected under the proposed plans; however, they were especially fearful that it will be difficult to elect a candidate of choice in the proposed Senate District 26 if Senator Brown did not decide to run for re-election. U.S. Ex. 516 P 7 (Barnes, Bibb County Bd. of Ed.); *U.S. Ex. 519 P 8;* U.S. Ex. 725, 36:15-37:3 (Hart, County Comm.). The witnesses from Senate District 26 expressed concerns about the reductions in the district's minority population and testified that people tend to vote along racial lines. *See, e.g.*, U.S. Ex. 515 P 6; U.S. Ex. 723, 53:11-16 (Abrams, Bibb County Bd. of Ed.); U.S. Ex. 726, 28:11-29:10, 82:22-85:5 (Bivens, County Comm.). However, these witnesses did not describe the type of racial appeals or polarized voting evident in Senate District 2 and 12.

The State argues that admissions by the United States' declarants that it would be possible to elect candidates of choice in the proposed districts are evidence that no retrogression will occur. For example, Alderman Clifton Jones states that, "although more difficult under the new plan

for Senate District 2, blacks still have a fair opportunity to elect the candidate of their choice." C. Jones dep. at 63. However, the State's reliance on these statements is as misplaced as is its reliance on the "equal opportunity point." The retrogression analysis does not ask if a proposed district is "fair" or whether a possibility exists that a minority preferred candidate would be elected. Indeed, Jones' statement that it would be "more difficult" to elect a candidate of choice points to a retrogression in minority voting strength.

Legislative Influence

A final note is required due to an argument advanced by Georgia that rests on the expectation that the proposed districts will elect Democratic candidates. Georgia asserts that African American voters in Georgia tend to vote for Democratic Party candidates in excess of 90% of the time. While this assertion appears to be unsupported by empirical evidence, Epstein provides this number in a footnote, Pl. Ex. 25 at 17 n.14, and several of plaintiff's lay witnesses support the proposition that African Americans overwhelmingly vote for Democratic candidates. However, it does not follow that anything that is good for the Democratic Party is good for African American voters—at least, within the context of this court's Section 5 inquiry.

Georgia asks the court to equate African American voters' electoral strength with the success of the Democratic Party at the polls. "The evidence in this case is absolutely uncontradicted that minority voting strength is enhanced by the Democratic strategy, joined in by both black and white Democrats, to maintain Democratic majority in the Senate." PPFF at P 618. The reapportionment plan has been crafted predominantly to ensure continued Democratic control of the State Senate, and plaintiff explains that the "political performance" statistics for African Americans influenced the redrawing of the districts.

However, Engstrom's analysis of racial voting patterns demonstrates that white and African American voters regularly prefer different Democratic candidates at Democratic Party primaries. U.S. Ex. 601, Tables 1-3. Furthermore, the record demonstrates that many of the proposed senate districts were drawn to protect current white Democratic incumbents. *See* U.S. Ex. 703, 49:7-16, 80:4-81:20 (Senator Brown testified that he considered white Democrats to be the weakest link in the redistricting process, and that he excluded majority African American precincts from his district in order to assist neighboring white Democratic incumbents).

Plaintiff urges the court to consider "legislative influence" as a factor in assessing the effectiveness of minority voting strength. All of the African American legislators currently serving in the Georgia General Assembly are Democrats. Senator Brown testified that, were Republicans to be the majority in the Senate, Democratic African Americans would lose several positions as committee chairs. *See, e.g.*, Pl. Ex. 20 at 23-24. Congressman John Lewis testified to similar conclusions:

> I happen to believe that it is in the best interest of African American voters, and as far as I'm concerned, to all voters and all citizens, to have a continued Democratic-controlled legislature in Georgia. First of all, the great majority, and I think all of the black legislators presently elected, and most of the would-be black candidates, are Democrats or will be Democrats in the General Assembly.
>
> So, if black elected officials, black state legislators, are going to have any sense of control, any sense of power, as chairs of full committees or chairs of subcommittees, it will come with being in the majority. And when in the minority, they lose all of that. They lose the possibility of maintaining a chairmanship of a full committee or subcommittee.

> The great majority of the African American voters in the State of Georgia, 90 percent or more tend to vote the Democratic way. So, it's in our best interest for us to maintain a Democratic-controlled state legislature. I think that's important. I think this is a must.

Pl. Ex. 21, at 18-21 (Congressman Lewis Test.).

The State has pointed to no authority that supports the proposition that a political party's overall success, and accompanying positions of power for minority legislators, should be considered in assessing minority voters' effective exercise of their franchise. Indeed, *Whitcomb v. Chavis* suggests otherwise. There, the Court specifically distinguished between "racial vote dilution" and "political defeat at the polls." 403 U.S. 124, 153, 91 S. Ct. 1858, 29 L. Ed. 2d 363 (1971). The Court concluded that the evidence demonstrated a lack of racial bias in the voting community. *Id.* Nothing in the record suggested that African American citizens were prevented from registering to vote, were excluded from political parties, or were overlooked in the candidate slating process. *Id.* 403 U.S. at 149-50. Had the Democrats won more elections, the Court concluded, the African American community would have had no complaints about its representation. *Id.* Because most of the elections under consideration were won by Republicans, however, "the failure of the [black community] to have legislative seats in proportion to its population [] emerges more as a function of losing elections than of built-in bias against poor Negroes. The voting power of ghetto residents may have been 'cancelled out' . . . , but this seems more a euphemism for political defeat at the polls." *Id.* 403 U.S. at 153.

In *League of United Latin American Citizens v. Clements*, the Fifth Circuit considered a claim that a Section 2 violation was shown where plaintiffs argued that highly partisan voting was indicative of racially polarized voting because the majority of Republicans were white. 999 F.2d 831 (5th Cir.

1993). While concluding that political parties did not serve as proxies for race, *Id.* 999 F.2d at 860, the court agreed that "courts should not summarily dismiss vote dilution claims in cases where racially divergent voting patterns correspond with partisan affiliation as 'political defeats' not cognizable under § 2." *Id.* 999 F.2d at 860-61.

We believe that the converse is also true. Where a change in voting procedures will favor a political party supported by African Americans, courts need not conclude that African American voters' strength corresponds to that success. Rather, as did the Fifth Circuit, courts have an obligation to base their inquiry "upon a searching practical evaluation of the 'past and present reality.'" *Id.* 999 F.2d at 860. The inquiry in this Section 5 matter requires us to scrutinize the opportunities for minority voters in the redrawn districts to exercise their electoral franchise. The court emphatically rejects the notion that a plan that protects Democratic incumbents and a Democratic majority is necessarily a plan that does not retrogress with respect to African American voting strength. Whatever success the Georgia Democratic Party may enjoy as a result of the Senate redistricting plan does not and cannot immunize the plan's racially retrogressive effects from Section 5 attack. The Voting Rights Act was not enacted to safeguard the electoral fortunes of any particular political party.

e. Conclusion

In asking this court to enter a declaratory judgment that its Senate reapportionment plan does not have the effect of worsening minority voters' opportunities to effectively exercise their voting rights, the State must present competent evidence that will permit the court to engage in the analysis mandated by the Voting Rights Act.

We have engaged in a searching review of the record for evidence that would facilitate a competent comparison of the

benchmark Senate plan and the proposed plan, and their consequences for the voting strength of Georgia's African American population. We conclude that the State has not met its burden of proof. The expert testimony presented by the plaintiff was woefully inadequate. Epstein presented a report that was crafted to predict a "point of equal opportunity" that has little relevance to the retrogression inquiry mandated by Section 5. Plaintiff's retrogression analysis consisted of a simple comparison of the number of majority-minority districts, and the number of districts with "equal" chances of electing an African American preferred candidate. Defendants' expert was only marginally more helpful. Engstrom provided a report that presented no conclusions with respect to the existence of retrogression in the Senate plan. Finally, intervenors' expert offered no substantive evidence at all.

In short, the evidence presented by the parties, while voluminous, may be relied upon only for several limited conclusions. The number of Senate Districts with majorities of BVAP would, according to Georgia's calculations, increase from twelve to thirteen; according to the Attorney General's interpretation of the census data, the number would decrease from twelve to eleven. According to Georgia, the proposed Senate Districts 2, 12 and 26 would have BVAPs of 50.31%, 50.22% and 50.39% respectively; the Attorney General's calculations of BVAPs are slightly less, with Senate District 2 falling below 50% to 49.81% BVAP. Under the proposed Senate plan, the number of Senate Districts with majorities of black registered voters will decrease from 11 to 8 districts.

Plaintiff's expert predicts that, as BVAP in a district decreases, the probability that an African American candidate of choice will be elected diminishes. The percentages of BVAP in 11 of 12 of the existing majority-minority districts will decrease by 3.42%-26.28% in the redrawn districts. In

Senate Districts 2, 12 and 26, it will decrease by 10.27%, 4.77% and 11.65% respectively.

An analysis of local and regional elections demonstrates the presence of racially polarized voting in the benchmark Senate Districts and in several of the counties and cities included in the benchmark Senate Districts. Substantial portions of these jurisdictions fall within the proposed Senate Districts. Lay witness testimony also suggests the presence of racially polarized voting, especially in Senate Districts 2 and 12. There is, however, conflicting lay testimony regarding the probability that the redrawn Senate Districts will permit African American candidates of choice to win election.

Reaggregated results from statewide elections show that African American candidates may garner sufficient white crossover votes to win election in the proposed Senate Districts 2, 12 and 26. However, the record also supports a finding that African American candidates of choice running for State Senate seats are unlikely to receive the same levels of white crossover voting as may occur in statewide elections.

Finally, the decline in BVAPs in Senate Districts 2, 12 and 26 was not required by the State's constitutional obligation to draw districts that comply with the principle of one person-one vote. Under the reapportionment plan, predominantly African American precincts are removed from the under-populated Senate Districts 2, 12 and 26. Although the plan proposed to add African American population to these districts, the total result is a decrease in the districts' BVAP. The State has offered no evidence to suggest that this decrease was inevitable or necessary.

In light of these conclusions, the court finds that the State has failed to demonstrate by a preponderance of the evidence that the reapportionment plan for the State Senate will not have a retrogressive effect. The court simply is not persuaded, on the basis of the evidence before it, that minority voting

strength will not be significantly diminished by the proposed redistricting. The plan proposes to decrease the BVAPs in existing majority-minority districts such that they would constitute only bare majorities, or slightly less than majorities. It was Georgia's burden to produce some evidence to prove that these changes would not be retrogressive.

The State has produced no evidence to demonstrate that the demographics of the proposed Senate Districts counteract any reduction in BVAP. It has not attempted to show the number of white voters who cross over to vote for African American candidates of choice in the disputed districts and how that might affect the effective exercise of minority voters' franchise. Nor has the State presented evidence regarding potential gains in minority voting strength in Senate Districts other than Districts 2, 12 and 26. There are, without doubt, numerous other ways, given the limited evidence of racially polarized voting in State Senate and local elections, that Georgia could have met its burden of proof in this case. Yet, the court is limited to reviewing the evidence presented by the parties, and is compelled to hold that the State has not met its burden. Accordingly, we are unable to conclude that the Senate reapportionment plan will not have a retrogressive effect on the voting strength of Georgia's African American electorate.

2. United States Congressional Plan

Although Georgia has three African American representatives in the United States Congress, there is currently only one majority-minority Congressional district, the Fifth Congressional District. The proposed redistricting plan would include two majority-minority Congressional districts. Plaintiff argues that the plan also creates additional districts where African Americans have the opportunity for election, by increasing BVAPs in several districts.

Intervenors assert that the Congressional redistricting plan violates Section 5. First, they argue that the Congressional plan does not create two majority-minority districts. Rather, when African American *population* is counted in accordance with the Attorney General's Guidance, only the Fifth District remains a majority-minority district. However, the Fifth District has a majority BVAP. The court is not persuaded that the reduction in the African American population in the Fifth District necessarily constitutes retrogression.

Second, intervenors contend that the proposed Congressional plan retrogresses because of the reduction in the Fifth District's BVAP, and due to purported racially polarized voting in one 1998 election for Fulton County Commission and one 2001 runoff for Atlanta City Council president. There is, however, no evidence in the record to support these assertions.

Finally, intervenors suggest that the presence of alternative plans proves the existence of retrogression. The fact that some of intervenors' plans result in higher percentages of BVAP in certain districts (and lower percentages in others) does not establish that Georgia's proposed Congressional plan retrogresses. Intervenors' evidence, at best, shows that the General Assembly could have adopted a more Republican plan. The evidence in the record establishes by a preponderance of the evidence that the Congressional redistricting plan does not result in retrogression in the position of African Americans with respect to the effective exercise of the electoral franchise.

3. State House Plan

According to the 2000 census data, the benchmark State House plan contains 40 districts with a total black population over 50%, 37 districts with total BVAP over 50%, and 38 districts with total black voting registration over 50%.

The proposed plan would have 38 or 39 seats in districts with majorities of BVAP. While some of the existing House districts would experience decreases in BVAP under the proposed plan, there is no evidence before the court of racially polarized voting in any House Districts that might suggest that these decreases will have a retrogessive effect.

Intervenors argue that the House Plan is infirm because it contains multi-member districts. They suggest that courts have generally disfavored majority-minority districts because such districts have the potential to "submerge" substantial minority populations, making it difficult for minorities to select candidates of choice. However, of the multi-member districts in the proposed plan, six are majority-minority districts with BVAPs ranging from 54.14% to 65.18%. The other multi-member districts have relatively low levels of BVAP, ranging from 0.58% to 33.52%. Plaintiff asserts that African American voters will maintain voting strength in the majority-minority multi-member districts, as they will have the opportunity to elect candidates to each of the seats. Intervenors present no evidence or arguments that would convince the court that the multi-member districts will diminish minority voting strength.

The proposed State House redistricting plan would create two additional seats in majority-minority districts. The court is persuaded that the House redistricting plan will not have a retrogressive effect on minority voting strength.

D. Purpose of the Reapportionment Plans

The State argues that all three redistricting plans were drawn with the intent to maintain and bolster the Democratic control of the State House and Senate. In order to reach these goals, Democratic legislators sought to "unpack" majority black districts, and to increase Democratic voting strength throughout the State. The testimony of State Democratic legislators reflects a belief that African American votes,

which generally heavily favor Democrats, are "wasted" in districts with high percentages of African American voters. *See, e.g.*, Pls.' Resp. to USPFF P 344 ("Increasing the BVAP in Senate District 12 would waste black voters and diminish their impact in other districts and the reapportionment plan of the State as a whole."); Pl. Ex. 22 at 21 (Meggers). The plans also reflect an effort to prevent Democratic incumbents from being placed in the same districts.

In *Bossier II*, the Supreme Court held that "§ 5 does not prohibit preclearance of a redistricting plan enacted with a discriminatory but nonretrogressive purpose." 528 U.S. 320, 341. The Court held that its "longstanding interpretation" of the effect prong as limited to a concern with retrogression applied to the "purpose" prong of Section 5, which must cover "only retrogressive dilution." *Id.* at 327. In a Section 5 action, therefore, the government "need only refute the covered jurisdiction's prima facie showing that a proposed voting change does not have a retrogressive purpose in order for preclearance to be denied." *Id.* at 332.

Georgia has the burden of making a *prima facie* showing that the plans do not have a retrogressive purpose. *Id.* The blatantly partisan nature of the redistricting process and the goals of the authors of the redistricting plans do not violate Section 5. An intent to help the Democratic Party is not a retrogressive purpose, or an intent to decrease minority voting strength. *Id.*

Here, the State's plans undoubtedly spread out Georgia's African American voters. Plaintiff, however, contends, and no one has disputed, that this was done not to purposefully decrease minority voting strength, but instead to increase the electoral opportunities of Georgia's Democratic Party. Those individuals involved in the redistricting process testified at length regarding their intent to bolster the Democratic Party's majority in the Georgia General Assembly. *See, e.g.*, Pl. Ex. 20 at 23-24. We see no legal infirmity in this effort. Just as

partisan progression is no guarantor of Section 5 compliance, neither is it proscribed. Moreover, this court's previous analysis makes clear that the dilution of minority voting blocs does not always constitute retrogression. Here, in the end, there is simply no evidence that plaintiff intended to diminish the opportunities of minority voters to elect candidates of their choice. As such, the court concludes that neither Georgia's United States Congressional redistricting plan nor its State House plan was enacted with an impermissible retrogressive purpose. While the same record evidence would support a finding that the State Senate plan does not have a retrogressive purpose, we need not reach this issue as we hold that the Senate plan has a retrogressive effect.

IV. CONCLUSION

Accordingly, having considered the entire record herein and the relevant statutory and case law, it is hereby

ORDERED that the American Civil Liberties Union's motion for leave to participate as amicus curiae [108-1] is DENIED; and it is

FURTHER ORDERED that plaintiff's motion to vacate the court's grant of intervention [92-1] is DENIED; and it is

FURTHER ORDERED that defendants' and intervenors' motions to strike portions of Epstein's testimony [149] [150] are DENIED.

This court is divested of jurisdiction to consider Michael King's motion for a stay of proceedings [145] and renewed motion to intervene [144].

For the foregoing reasons, the court holds that the State of Georgia has not demonstrated by a preponderance of the evidence that the State Senate redistricting plan would not have a retrogressive effect on African American voters' opportunities to exercise their electoral power at the polls.

Accordingly, the court DENIES plaintiff's request to enter a declaratory judgment that Act No. 1EX6 does not have the purpose or effect of denying to abridging the right to vote on account of race or color.

The State of Georgia has demonstrated by a preponderance of the evidence that the Congressional redistricting plan does not have the purpose or effect of denying or abridging the right to vote on account of race or color. Accordingly, a declaratory judgment is GRANTED that Act No. 2EX11 does not violate Section 5 of the Voting Rights Act.

The State of Georgia has demonstrated by a preponderance of the evidence that the State House redistricting plan does not have the purpose or effect of denying or abridging the right to vote on account of race or color. Accordingly, a declaratory judgment is GRANTED that Act No. 2EX23 does not violate Section 5 of the Voting Rights Act.

An appropriate Judgment accompanies this Opinion and Order.

DATE April 5, 2002

/s/ _____
EMMET G. SULLIVAN
UNITED STATES DISTRICT JUDGE

DATE April 5, 2002

/s/ _____
HARRY T. EDWARDS
UNITED STATES CIRCUIT JUDGE

CONCUR BY:

EDWARDS; SULLIVAN; OBERDORFER (In Part)

CONCUR:

EDWARDS, *Circuit Judge, concurring*, with whom SULLIVAN, *District Judge*, concurs: I concur fully in Judge Sullivan's comprehensive opinion for the court. I write separately only to respond to the arguments made by our dissenting colleague, whose opinion is, I believe, wrong on the law and misguided as to how to weigh the various forms of evidence that have been presented to this court.

First, the law: Our dissenting colleague argues that § 5 is satisfied whenever a covered jurisdiction adopts a plan that preserves an "equal or fair opportunity" for minorities to elect candidates of their choice. This is not an accurate statement of the law. What the dissent has effectively done is to import § 2's focus on equality into the § 5 inquiry. This is not the way this court has been charged to adjudicate a § 5 case. The dissent cites no authority for this argument, which is not surprising considering that no such authority exists.

The Supreme Court has consistently made it clear that § 5 and § 2 are procedurally and substantively distinct provisions. *See Reno v. Bossier Parish School Bd.*, 520 U.S. 471, 477, 137 L. Ed. 2d 730, 117 S. Ct. 1491 (1997) ("*Bossier I*"). Section 2 protects minority voters in every state against electoral plans that deny them equal or fair voting opportunities. *See Voinovich v. Quilter*, 507 U.S. 146, 155, 122 L. Ed. 2d 500, 113 S. Ct. 1149 (1993). Section 5, in contrast, protects minority voters in certain southern states from *changes* in electoral plans that have the purpose or effect of diminishing their voting rights relative to the status quo that is proposed to be changed. *See Reno v. Bossier Parish School Bd.*, 528 U.S. 320, 334, 145 L. Ed. 2d 845, 120 S. Ct. 866 (2000) ("*Bossier II*").

It is therefore clear that the standard against which a plan must be measured in a § 5 preclearance case is always the existing plan. The illusive standards of equality or proportionality are not the guideposts in a § 5 case. The electoral opportunities available under the benchmark plan frame the inquiry in determining whether the corresponding opportunities afforded by the new plan satisfy § 5. A status quo protective of African American voting strength cannot be weakened merely because that status quo exceeds the law's minimum requirements. That preclearance can be denied only when a plan retrenches on existing opportunities hardly suggests, as the dissent would have it, that substantive retrenchment can in certain cases simply be ignored. Instead, the one-way ratchet imposed by § 5 means that tangible gains made by African Americans voters need not be surrendered merely because the State has sought to undo those gains with a plan that is (perhaps) not independently unlawful under § 2.

To so hold would be to undermine the Supreme Court's consistent efforts to construe § 2 and § 5 "to combat different evils and, accordingly, to impose very different duties upon the States." *Bossier I*, 520 U.S. at 477. When the idea of *retrogression* is taken seriously, as the dissent refuses to do, it is quite obvious that a proposed plan backslides from an existing plan if it merely affords the protected class an equal opportunity to a elect a fixed number of candidates and the existing plan affords the protected group a significantly better than equal chance of electing that same slate of candidates. Accordingly, all other things being equal, a state that converts a safe district into one where African Americans have only a "fair opportunity" would be hard-pressed to preclear its plan under the § 5 analysis described by the Supreme Court. For it simply could not be said of such a plan that it "is no more dilutive than [the plan] it replaces." *Bossier II*, 528 U.S. at 335.

In sum, then, neither the Supreme Court nor any other court, has held—or even hinted—that preclearance under § 5 must be granted to a plan that protects equal electoral opportunities for minority voters, even though it materially reduces those opportunities available under the existing electoral scheme. This is hardly remarkable, as the entire concept of *retrogression* militates against such a result. Our dissenting colleague simply blinks legal reality in insisting otherwise.

* * * *

This legal error infects the whole of the dissent's analysis. Discounting the need for a serious retrogression inquiry leads the dissent to overvalue the testimony of the African American legislators who spoke in favor of the proposed Senate plan. The dissenting opinion suggests that this evidence is more probative than what it describes as the "flawed expert testimony and conflicting lay witness testimony" presented by the plan's opponents. This approach has several serious flaws.

In the first place, it represents an inappropriate attempt to reframe the case with the testimony of politicians at the center of the court's inquiry. This is highly problematic, because *all* of the parties to this litigation agreed that, in light of the State's deliberate (and apparently strategic) decision to significantly decrease the black voting populations in several Senate districts, the statistical evidence concerning *polarization* is the principal issue in the case. The parties generally agreed that, in order to assess polarization, we must consider the degree to which African American voters have had to rely on white crossover votes to elect preferred candidates. As the issue was framed by both Georgia and the United States, these data were highlighted as the determinative factor in assessing whether the Senate plan should be precleared. The parties certainly did not suggest

that the inconsistent testimony of African American politicians could somehow overcome the statistical data on polarization.

Indeed, the State's evidentiary case is built on the assertion that racially polarized voting is uniform across the state, and uniformly low. The utility of Dr. Epstein's analysis, which Georgia put forward as the centerpiece of its evidence, rises and falls on the validity of this proposition. The dissent ignores this and offers its own view on how the plaintiff's case should have been argued. In other words, the dissent has attempted to do for the State what it did not seek to do for itself: to elevate the testimony of three political leaders (only one of whom had first-hand knowledge of the districts most hotly in dispute) above the empirical evidence regarding the effect of declining BVAP on African American electoral opportunities. Even if it were permissible for a judge to change the theory of a plaintiff's case (with no notice to the other side) and then make evidentiary findings to which no party subscribes, the dissent is still wrong in the conclusion that it reaches. Why? Because the testimony on which the dissent focuses can in no way carry the State's burden of proving that its Senate plan will more likely than not generate no retrogressive effect.

* * * *

Before turning to the politicians' testimony and how it should be weighed, I first reject the dissent's assessment of the importance and the clarity of the statistical evidence in the record before us. The only such evidence presented by Georgia was Dr. Epstein's probit analysis. For this analysis to be at all relevant, it was crucial for the State to demonstrate that it was based on a realistic assessment of racial polarization. Otherwise, Dr. Epstein's testimony is of virtually no utility in determining whether the numerical decreases in the disputed districts will actually affect African American voting strength. Yet, the entire basis for the State's

assumption of low polarization in these areas are data from *statewide* races, which the defendant's expert, Dr. Engstrom, rejected as having little bearing on the likely degree of white crossover in local Senate elections.

Dr. Engstrom testified that polarized voting patterns persist in local elections in the Senate districts challenged by the United States. His data indicated that in nonstatewide races in the proposed Districts 2, 12, and 26, racial polarization was considerable and white crossover persistently low. He offered his expert opinion that this polarization was statistically significant and that it fatally undermined Dr. Epstein's probit analysis. The State put on no expert testimony to refute this damning claim; nor did it submit its own statistical analysis of the data on which the Dr. Engstrom relied. Instead, using only the decidedly non-expert analyses put together by its lawyers, Georgia asked the court to accept Dr. Engstrom's data, but to ignore the conclusions that the expert had drawn from that data. This offer, which the dissent has now credulously accepted, requires the court to cast itself adrift from the expert's data and analyses and instead to rely on its own inexact and untested impressions on the significance of crossover voting patterns. Such amateur theorizing is entirely inappropriate. The simple and controlling fact in this case is that Dr. Engstrom's expert data and analyses have not been refuted by expert testimony from the State.

Moreover, while it is true that the polarization trends appear less problematic in statewide races, that fact tells us little about the elections that are at issue in the Senate plan. It was the plaintiff's burden to demonstrate that the statewide data rehabilitate Dr. Epstein. It did not do so. The dissent now suggests several benign explanations for why white crossover may be greater in the regional races. This is all well and good, but such *post hoc* efforts by a judge cannot disguise the fact that the State presented not a shred of evidence—statistical or otherwise—to support such suggestions. With Georgia

bearing the ultimate burden of proof, I am simply unwilling to gamble that the serious racial bloc voting that has undeniably occurred in numerous local elections in the disputed districts will not continue under the new Senate plan.

Ultimately, we must decide this case on the basis of the record made by the parties; it is not our role to engage in idle speculation about what might be, or what could have been, in lieu of examining and evaluating what actually has been proven—and, more importantly, what has not been proven. The State has not met its burden of proof on the crucial issues of crossover patterns and polarization. Judicial speculation cannot overcome this reality.

* * * *

In an apparent effort to rescue the State from the weakness of its own statistical evidence, the dissent suggests that the testimony of the three African American legislators, only one of whom is actually qualified to speak about the districts most important to this case, accomplishes what the State's statistical data could not. The dissent's view appears to be that if a few well-respected African American leaders are satisfied with the challenged plan, it should pass muster under § 5. Respectfully, this is not the law.

I do not mean to suggest that support among minority representatives can never be relevant to whether a proposed reapportionment plan comports with the Voting Rights Act. In this case, however, such evidence does not save Georgia's otherwise infirm plan. For not only is the testimony of Congressman Lewis, and State Senators Brown and Walker largely irrelevant to the legal issue before the court, but, insofar as it is relevant, it does not contradict the statistical data that the dissent seeks to supplant.

First, nowhere do any of these esteemed politicians purport to compare the proposed Senate plan with the existing

apportionment scheme. Accordingly, while some of what they have to say bear upon (albeit only in the most general terms) the opportunities available to minority candidates under the new plan, their testimony simply does not address *retrogression,* which, as we have explained, in the only relevant legal inquiry under § 5. Nor do these legislators address the polarization problem that is at the heart of the Court's decision to deny preclearance. Their statements therefore cannot refute the detailed evidence presented by the United States regarding the effects of this crucial phenomena in the places where it matters most. If the lack of positive racial polarization data was the gap at the center of the State's case, the evidence presented by these estimable men does not come close to filling that void. Whatever the dissent has taken from their testimony can therefore be but marginally related to the task assigned to this court by the Voting Rights Act.

Indeed, of these three legislators, neither Congressman Lewis nor Senator Walker had any direct knowledge of the demographics and voting patterns in the contested districts. Accordingly, their testimony about the general BVAP levels at which African American preferred candidates have a fair opportunity to compete, in addition to being tangential to the question of retrogression, has little bearing as to what levels might be required in Districts 2, 12, and 26. The dissent's puzzling genuflection to this vague evidence therefore does not support the result it claims.

Moreover, the testimony of Senator Brown, who represents District 26, leaves little doubt that he was speaking primarily as a loyal Democrat, interested in advancing the political fortunes of his own party. As he was actively involved in drawing the proposed lines for his home district, his support for that new shape is unremarkable. What is more telling, however, is Senator Brown's ready recognition that his motives were primarily partisan. "Of course, since I am currently serving the district I looked at where I think the

votes would be that would, you know, enhance the districts in terms of the likelihood the Democrats would be able to retain it as a Senate plan seat." Defendant's Exhibit 729, at 32. Brown acknowledged that "I was not looking at race as a predominant concern," *id.* at 34, but instead that "I am looking at the overall objective that I have always wanted to maximize Democrat performance," *id.* at 35.

Given that Senator Brown was the only African American state Senator from a contested district who testified on the State's behalf, his candor is especially significant. That he and a number of his peers support the proposed Senate plan may well bespeak sound politics by partisans of the Democratic party. But that Georgia's African American politicians sought to make their state safer for Democratic candidates does not establish (or even imply) that in so doing they did not make it worse for African American voters. Indeed, Senator Brown's enthusiasm for the plan seems to reflect a general agreement among Georgia Democrats that the present reapportionment will preserve their partisan interests more effectively than any alternative. While such considerations are not impermissible under the Voting Rights Act, they are certainly not sufficient to satisfy the demands of § 5.

The dissent also tries to rely on the testimony of Senator Regina Thomas that she expects to win reelection. It is hardly surprising that a politician seeking reelection expresses the optimistic view that she will win her race. It would do her no good to announce that she will lose. What is more noteworthy, however, is that Senator Thomas voted against the new Senate plan, arguing that it is retrogressive.

Furthermore, Senator Thomas' assessments regarding her chances of reelection are irrelevant. The Voting Rights Act does not protect minority incumbents; it protects minority voters. It is thus a dangerous business to conflate a

politician's assessment of her own continued electoral prospects with the genuine protection of African American voting strength.

Finally, insofar as the dissenting opinion turns to this legislative evidence on the assumption that it is less confused and contradictory than the statistical evidence, it chases a false prophet of its own invention. The three politicians on whom the dissent relies represent but a small slice of the testimony presented regarding the attitudes of Georgia's African American political leadership to the proposed Senate plan. Indeed, it is simply inaccurate to suggest that those leaders have spoken with a single voice. The United States offered the testimony of a number of prominent African Americans, from each of the three Senate Districts that it has challenged, in which those witnesses expressed considerable concern about the effect of the proposed changes on minority voting strength. The Senate plan, for whatever support it has received, cannot fairly be said to represent the unanimous preferences or desires of the African American leaders in the State of Georgia. The reality is simply more complicated than our dissenting colleague suggests.

In the face of such heterogeneity of views, it seems entirely inappropriate to say, as the dissent does, that the opinions of some African Americans pale in importance compared to those of others. In determining the likely impact of the proposed changes, I can see no principled basis upon which to conclude, for instance, that Congressman Lewis' conviction that the plan will inure to the benefit of African Americans should, in the context of this § 5 litigation, be given more probative weight than Senator Thomas' opinion that it will not. Nor does our dissenting colleague supply any such basis. Instead, he simply declares that those witnesses whose testimony accords with his own conclusion are credible and probative, while simultaneously discounting (or

ignoring altogether) the testimony of others whose views diverge from his own.

In sum, then, the political opinions on which the dissent relies simply cannot bear the weight that has been placed upon them. Why? Because these individual expressions of support do not even purport to seriously address the issues of crossover voting patterns, polarization, and, most significantly, *retrogression,* which are the subjects of this § 5 litigation. And, in addition, the cited political opinions do not conclusively reflect the sentiment of African American leaders in Georgia. Our dissenting colleague's effort to convert these opinions into a legally sufficient basis for approving the disputed State Senate plan is therefore entirely unconvincing. Indeed, it is quite strange to find the dissenting opinion hinged to a political judgment whose very *political* nature makes it an inaccurate and unreliable indicator of the very thing that the dissent would use it to predict. The dissent not only relies on this dubious evidence, but seeks to absolve this court of its responsibility of judging by blindly deferring to the judgment of the very politicians whose actions we have been charged with scrutinizing.

Judge Sullivan's opinion for the court is, in my view, correct in its statement and application of the law, correct in its finding of facts, and correct in its weighing of the various forms of evidence that have been presented to this court.

DATE April 5, 2002

/s /_____
HARRY T. EDWARDS
UNITED STATES CIRCUIT JUDGE

DATE April 5, 2002

/s /_____
EMMET G. SULLIVAN
UNITED STATES DISTRICT JUDGE

DISSENT BY:

OBERDORFER (In Part)

DISSENT:

OBERDORFER, *District Judge*, concurring in part and dissenting in part.

I am pleased to join in Parts III.C.2 and III.C.3 of Judge Sullivan's opinion. I agree that Georgia has met its burden of proving, by a preponderance of the evidence, that the proposed Congressional and state House redistricting plans have neither a retrogressive purpose nor effect. However, with respect to the state Senate redistricting plan, I give greater credence to the political expertise and motivation of Georgia's African-American political leaders and reasonable inferences drawn from their testimony and the voting data and statistics than to what I find to be flawed opinions of experts and conflicting lay witness testimony presented by the Department of Justice and intervenors.

As a legal matter, I am not persuaded that a plan that reduces the "*probability*," see ante at 129-132, that minority candidates of choice will prevail in three of Georgia's fifty-six Senate districts, yet preserves an equal or fair opportunity for those candidates and other minority candidates statewide, is for that reason *alone* "retrogressive" in effect in violation of § 5.

The question before us is whether the proposed Senate plan as a whole, has the "purpose or effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c. To resolve that question we must determine the extent to which, if any, Georgia's minority voters are likely to retain effective "voting" strength equivalent to what they possess under the benchmark Senate plan. As my colleague, Judge Sullivan, puts it, analysis of that question must be "fact-intensive," requiring us to examine closely "the context

in which the voting changes will occur." Ante at 114. For that task we are not only judges of the law; like jurors we are triers of fact. It is our responsibility to determine the weight, the effect, and the value of the evidence, and the credibility of the witnesses. We are to judge expert testimony "just as any other evidence"; we may "accept it or reject it, or give it as much weight as [we] think it deserves." [46] Like jurors, we may draw from the evidence "any inferences or conclusions that reason and common sense lead [us] to make." [47] To establish a fact by a preponderance of the evidence the proponent of that fact must in essence persuade us "that it is more likely so than not so." [48] In determining whether a fact has been established by a preponderance of the evidence, we "should consider all the evidence bearing upon that fact, regardless of who produced it." [49] Georgia may therefore find support for its case in the testimony of the Department's expert and lay witnesses.

Georgia has offered two primary sources of support for its argument that African-Americans will enjoy an equal opportunity to win even in districts where barely over 50% of the voting age population is black: testimony from Congressman John Lewis, state Senator Robert Brown, and state Senate majority leader Charles Walker, and Dr. David Epstein's expert witness report. As Judge Sullivan notes, the testimony of expert witnesses in this case has been unhelpful, with no expert reports focusing "on the question of whether the proposed redistricting plans are retrogressive." Ante at 86. The testimony of Lewis, Brown, and Walker—that African-American candidates can win elections anywhere in the state

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[46] Standardized Civil Jury Instructions for the District of Columbia at 3-3 (1998).

[47] *Id.* at 2-3.

[48] *Id.* at 2-8.

[49] *Id.* at 2-9.

of Georgia where blacks are a bare majority, or even slightly less, of the voting age population—is to my mind entirely credible and inadequately refuted by the Department's expert witness or lay witnesses from the three contested state Senate districts. As trier of fact, I would therefore find that it is more likely than not that:

> (1) The proposed Senate plan will increase from twelve to thirteen the number of Georgia Senate districts in which African-Americans are a majority of the voting age population.
>
> (2) Under that plan, African-Americans statewide will retain the power to elect eleven state Senators.
>
> (3) Results from statewide and local elections in the three disputed districts, viewed in the context of the Lewis, Brown, and Walker testimony and reasonable inferences therefrom, establish that over the next decade there will be sufficient and increasing white support for minority candidates of choice in the disputed districts and statewide.
>
> 4. Black voters in proposed Senate Districts 2 and 26, in tandem with reliable white crossover, will have the necessary voting strength to continue to elect their candidates of choice. In Senate District 12, African-American voters may not be able to defeat the white incumbent to elect their candidate of choice to the Senate seat, but will retain an influential role in elections, representing no change from the status quo in terms of that district or in terms of the number of minority candidates of choice elected to the Senate statewide.

Accordingly, I am persuaded that the proposed Senate plan has neither a retrogressive purpose nor effect, and is entitled to preclearance under § 5.

I. Findings of Fact

Although the facts are well stated in Judge Sullivan's comprehensive opinion, the findings I make and the inferences I draw on the basis of the extensive record in this case require some repetition and reevaluation.

A. 2001 Reapportionment Process

Georgia's African-American legislators were key figures in crafting the Congressional, House, and, particularly, the Senate reapportionment plans. The Congressional reapportionment plan was drafted by a conference committee, consisting of three state Senators and three members of the state House. Three of the six were African-American. See ante at 31. Of the twenty-nine members of the state House committee responsible for redistricting, six were African-American. See *id.* at 26. Twenty-four members of the state Senate, six of whom are African-American, served on the Senate redistricting committee. See id. Senator Brown, who represents Senate District 26, served as the vice-chairman of that committee and chaired the subcommittee responsible for drafting the proposed Senate plan. *See id.* at 30.

In addition to participation by individual legislators, the voting support of African-American legislators for all three of the proposed plans was overwhelming, and in the case of the Senate plan, necessary for its adoption. No member of the House or Senate Legislative Black Caucuses voted against the proposed Congressional reapportionment plan. *See id.* at 35. One African-American member of the House, Dorothy Pelote, of the Savannah area, and one African-American member of the Senate, Regina Thomas, also of the Savannah area, voted against the proposed House plan, which passed in both chambers with a comfortable margin. *See id.* at 41. Representative Pelote and Senator Thomas were also the only African-American legislators to vote against the proposed Senate plan. *See id.* at 63. Although the House approved the

Senate plan by a 101 to 71 vote, the plan was approved in the Senate by a narrow 29 to 26 vote, *see id.*, essentially on political party lines. See E. Johnson Dep. at 27. Ten out of eleven African-American senators voted in support of the redistricting plan. Without the support of at least nine of those African-American senators, the plan would have failed.

B. Senate Redistricting

1. Comparison of the Benchmark and Proposed Plans

Under the benchmark redistricting plan, thirteen of Georgia's fifty-six Senate districts are majority African-American, measured both by total population and voter registration. African-Americans are a majority of the voting age population in twelve of those districts. See ante at 63-64.

The proposed plan, based on 2000 census data, also creates thirteen Senate districts where African-Americans are a majority of the total population. If voter registration is used as a yardstick, the number of districts where more than half of registered voters are African-American drops to eight. However, if voting age population is the relevant measure, the proposed plan creates thirteen districts with a BVAP greater than fifty percent, a net increase of one district.[50]

Statewide, the proposed Senate plan would "unpack" districts that previously had high concentrations of voting-age African-Americans, ranging from fifty-five percent to more than eighty percent, and would reduce those black majorities to the neighborhood of fifty (and a fraction) to sixty percent.

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[50] I use the plaintiff's methodology, which I found more convincing. *See infra* at n.25. When the Department of Justice's methodology is employed, the number of districts in the proposed plan that are majority-minority as measured by BVAP falls to eleven. *See* ante at 64. According to Georgia, the BVAP in proposed Senate Districts 2 and 34 is 50.31% and 50.54%, respectively, while the Department of Justice calculates the BVAP at 49.81% in District 2 and 49.53% in District 34.

Under the benchmark plan, only two of the twelve relevant Senate districts—District 12, with a 55.43% BVAP, and District 39, with a 54.73% BVAP—have less than sixty percent BVAP.[51] Five other benchmark Senate districts have a BVAP between sixty and seventy percent. Four benchmark Senate districts have a greater than 70% BVAP, and in one—Senate District 43—88.91% of the voting age population is black. *See* Def. Ex. 117. Of these twelve majority-minority districts, eleven experience a decline in their BVAP percentage under the proposed Senate plan,[52] along with a concomitant drop in the percentage of registered voters who are African-American. See Def. Ex. 118. Despite this overall decrease in arguably overconcentrated black voting majorities, the Department of Justice has focused narrowly on the three proposed Senate districts that would have the lowest BVAP levels under the proposed plan. Using Georgia's methodology, under the proposed plan Senate District 2 would have a BVAP of 50.31%, Senate District 12, a BVAP of 50.66%, and Senate District 26, a BVAP of 50.80%.

2. Testimony of African-American Political Leaders

Georgia has offered from three of its African-American political leaders testimony that under the proposed plan black candidates, presumably the candidates of choice for the majority of black voters, will retain the ability to be elected in districts with a narrow majority of voting-age African-Americans, such as Senate Districts 2, 12, and 26.

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[51] Senate District 12 is represented by a white incumbent, Michael Meyer von Bremen, while the incumbent in Senate District 39, Vincent Fort, is African-American.

[52] The BVAP in Senate District 39 increases by 1.81% from the benchmark plan. Additionally, the BVAP in proposed Senate District 34, which represents a net addition to the number of majority-minority districts (by Georgia's calculations), increases by 16.58%. *See* Def. Ex. 118.

Congressman John Lewis

Congressman Lewis represents the Fifth Congressional District, in the Atlanta metropolitan area. His leadership and courage during the Civil Rights Movement and since have been instrumental in the passage of the 1965 Voting Rights Act and its continuing vitality. *See* Lewis Dep. at 6-11. For decades, he has been intimately involved in, and informed about, the unique politics of the South, and particularly Georgia politics, beginning with his directorship of the Voter Education Project in 1970. *Id.* at 12. His credibility as an advocate for African-American voting rights, as the Justice Department acknowledges, is "beyond reproach." Tr. 2/26/02 at 99. The Department and intervenors object that Congressman Lewis' testimony is irrelevant, because he does not serve in the state Senate and does not reside in any of the three contested districts.[53] However, Congressman Lewis based his opinion not only on his experience in campaigning for Congress in the metro Atlanta area, but on his familiarity with Georgia politics at all levels and in all regions of the state. "I've spent a great deal of time traveling the length and breadth of the state. . . . I keep up with what is happening all

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[53] The intervenors further argue that Congressman Lewis is biased because it is in his "best interest[] to have Democrats remain in control." Tr. 2/26/02 at 158. The intervenors misapprehend his testimony. As a member of the United States Congress, it is in his personal self-interest to have a Democratic majority in the House of Representatives, because it would place him (and other minority Members of Congress) in line to chair a House committee or subcommittee. See Lewis Dep. at 20. The Georgia Senate operates on a different political plane than the United States Congress, and Congressman Lewis realizes no personal benefit from a Democratic majority in the former. It is reasonable to infer that he would prefer control of the Georgia Senate by the Democratic party, as it is now constituted, because he considers it more responsive to the interests of his constituents than is its opposition.

over the state. It doesn't matter whether it's south Georgia, extreme coastal or north Georgia, I try to be responsive and involved." *Id.* at 17.

Congressman Lewis testified that, in his political judgment, black candidates have a better than even chance of winning a district with 50% BVAP throughout Georgia:

> I think a candidate, a good solid black candidate, would have more than a 50 percent chance of winning with a 50 percent BVAP [district] in Georgia. Whether or not a black candidate wins in a district with that level of BVAP will depend more on the specifics of that particular candidate and his or her campaign. The kinds of things that are important in any campaign, like hard work, putting together a good organization, and so on, will make a difference. But a credible black candidate certainly has a good chance of winning a legislative seat anywhere in the State, I think with a 50% BVAP.

Id. at 18.

On the whole, Congressman Lewis finds the creation of a greater number of districts with a slim minority majority to be preferable to fewer "safe" minority districts. "Giving real power to black voters comes from the kind of redistricting efforts the State of Georgia has made with these plans, both for Congress and for the General Assembly, House and Senate. . . . We don't need to create these black enclaves politically. It dilutes the ability of minority voters to elect more people, and to affect who has the majority." *Id.* at 23.

Senator Robert Brown

Senator Brown is the incumbent state Senator in District 26 and chairs the Senate subcommittee responsible for the proposed Senate redistricting plans. Like Congressman

Lewis, he believes black candidates, both incumbents and challengers, can be reelected and elected in a district with a 50% BVAP:

> I think the incumbents in these districts at these BVAP levels are in very solid shape. But speaking specifically to the question of an open-seat, I think that an African-American candidate would have a good chance of winning. He or she would have to have a good organization and work hard, but there's no reason why an African-American can't win at a 50% BVAP. . . . And I can tell you this. The nearly unanimous consensus from the Black Caucus in the Senate that voted for the plan would never have been there had that not been a belief shared by those senators.

Brown Dep. at 30.

As the incumbent from Senate District 26, Senator Brown is familiar with, and singularly qualified to give opinion testimony about, the demographics and white crossover trends in his own jurisdiction. He also expressed the opinion that Senate Districts 2 and 12 specifically, in addition to his own district, would remain competitive for an African-American candidate of choice under the proposed plan. *See id.* at 40-42.

Senate Majority Leader Charles Walker

Georgia offered similar testimony from the state Senate majority leader, Charles Walker. Senator Walker represents a district centered in Augusta. He was of the opinion that the BVAP levels necessary for an African-American candidate of choice to have a fair opportunity of electoral success were even lower than Congressman Lewis and Senator Brown estimated: "Generally around the state, I would feel comfortable at a 45% BVAP level. . . . All of the 13 Senate districts in the plan are well above that level." Walker Dep. at 12.

Senator Brown and Senator Walker, who are both Democrats, may well support the proposed redistricting plan in part because it is likely to preserve a Democratic majority in the state Senate, enabling Senator Brown to maintain his current committee leadership positions and Senator Walker to continue to serve as majority leader. But as a practical matter, Senator Brown and Senator Walker only reap the benefits of a continued Democratic majority in the Senate if they are able to be elected from their newly constituted districts, making it unlikely they would support a redistricting plan that materially reduced their re-election chances. Their willingness to reduce the BVAP levels in their own districts to bare majorities is persuasive evidence that they have such confidence in their estimates of minority political strength that they are willing to stake their own political positions on the accuracy of those estimates.

3. Expert Witness Testimony

Dr. Epstein, Georgia's expert witness, analyzed the results in all elections in Georgia to the state House, the state Senate, and the United States Congress between 1996 and 2001, using a probit analysis. That analysis purports to calculate the statistical chance of an African-American candidate of choice winning election at varying levels of BVAP. See ante at 86-87. Based on the results in those elections, Epstein estimated that minority voters have an even or better chance of electing their candidate of choice in an open seat election if the BVAP is 44.3%, and a 75% or better chance of electing their candidate of choice when the BVAP rises to 50%. *See id.* at 90, 92. His analysis assumes that black voters are highly cohesive in supporting their respective candidates of choice, while white voters are relatively less so. "This estimate is reasonable in light of the significant difference in crossover voting; for black voters, it is typically less than 5%, while for white voters in general elections it is generally around 20%." Pl. Ex. 25, at 17.

The Department's expert witness, Dr. Richard Engstrom, and the intervenors's expert witness, Dr. Jonathan Katz, criticize Epstein's methodology, see ante at 94-96, but only Engstrom offers countervailing statistical evidence, which examines the extent to which racially polarized voting exists in Senate Districts 2, 12, and 26.

To assess differences in the voting preferences of white and black voters, Engstrom looked at three categories of biracial elections in benchmark Senate Districts 2, 12, and 26: (1) elections to the Senate seat in two of the three districts; (2) election returns in each district in contests for statewide office; and (3) local elections in the largest city and/or most populous county in the district. He concluded that there were high levels of racial polarization (or low levels of white crossover voting) in the contested Senate districts. As Judge Sullivan noted, however, "Engstrom does not attempt to predict the effect of this polarized voting on the ability of minority voters to elect candidates of their choice under the proposed redistricting plans," *id.* at 98, leaving it for us to determine the reasonable inferences and ultimate conclusions to be drawn from his data patterns in light of all the factual circumstances.

a. Senate District 2 [54]

i. Elections for State Senate

Engstrom's analysis looks at three elections in Senate District 2, two non-partisan and one partisan: a 1999 special non-partisan election in which there were multiple candidates, including four African-Americans; a 2000 special non-partisan runoff between the winner and top African-American vote-getter, Regina Thomas, who won that election to become

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[54] Statistics in this section are taken from the King's Ecological Inference methodology column in Def. Ex. 611, Table 1.

the incumbent in Senate District 2; and the 2000 general election between Senator Thomas and a white Republican challenger.

Engstrom's data about the recent elections involving Senator Thomas shows that the willingness of white voters to vote for an African-American, far from being polarized, varies dramatically. In the 1999 special election, 20.4% of whites crossed over and voted for a black candidate, although their votes did not necessarily go to Senator Thomas, who received only 5.0% of the white votes cast in that election. Only 8.9% of white voters crossed over to support her in the special runoff, which she narrowly won against a well-qualified white candidate. However, in the following year, running as an incumbent Democrat in a general election, Senator Thomas won with 43.6% of the white vote and nearly 80% of the total vote.

None of the elections Engstrom examined involved typical circumstances. The 1999 special election and 2000 runoff were non-partisan, meaning that no candidate benefitted from party affiliation. Additionally, there were four black candidates and two white candidates in the special election, dividing the black vote. In the 2000 general election, the white candidate, in addition to being a Republican in a heavily Democratic district, was also a pizza delivery boy with a criminal record. See Thomas Dep. at 32-33.

ii. Statewide Elections

Engstrom's analysis of votes cast in benchmark Senate District 2 in statewide races shows that, as an empirical matter, significant numbers of white voters crossed over to vote for a black candidate. Engstrom analyzed seven statewide races: the Democratic primary and general election for Insurance Commissioner; the Democratic primary, Democratic runoff, and general election for Labor Commissioner; the Democratic primary for Public Service

Commissioner; and the general election for Attorney General. In the four Democratic-only races, white crossover for the black candidate ranged from a low of 31.8%, in the runoff for Labor Commissioner, to a high of 58%, in the primary for Public Service Commissioner.[55] In the general elections, where black Democrats faced off against white Republicans, 27.8% of white voters in benchmark district 2 voted for the black candidate for Insurance Commissioner, and 44.8% and 44.9%, respectively, voted for the black candidates for Labor Commissioner and Attorney General.[56]

The probative value of these results is affected by Engstrom's necessary reliance on elections conducted in benchmark districts. There are significant differences between the political geography of the benchmark and proposed districts, due to the removal of some precincts and the addition of others. See ante at 139-141. To control for this, Engstrom performed a re-aggregation analysis, which examines voting patterns in the precincts that constitute the proposed district. See Def. Ex. 611, Table 4. His re-aggregation analysis shows only the total percentage of the vote a candidate would receive in the proposed Senate district, without breaking down the preferences of black and white voters. However, the analysis indicates that, with respect to proposed Senate District 2, every black candidate who ran in a past statewide election would have carried the

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[55] The results of the four Democratic-only races disprove the hypothesis that some white voters are so politically partisan that they would support a black Democratic over a white Republican, but also so racist that they would never vote for a black Democrat if a white Democrat were running. *Cf. Smith v. Allwright*, 321 U.S. 649, 88 L. Ed. 987, 64 S. Ct. 757 (1944) (holding white-only primaries unlawful); *Terry v. Adams*, 345 U.S 461, 97 L. Ed. 1152, 73 S. Ct. 809 (1953).

[56] The African-American candidate for Attorney General, Thurbert Baker, prevailed in that election and represents the state of Georgia in this litigation.

proposed district, receiving between 57.4% and 77.7% of the total votes cast, a fact from which results in a Senate race in the new district may be reasonably inferred.

iii. Local Elections

Local races in Savannah, the largest city in Senate District 2, show low levels of white crossover voting, ranging from 2.8% to 10.6%. Engstrom analyzed eight elections, but those elections involved only two black candidates. Additionally, Engstrom codes all of the local elections in Savannah as non-partisan, which is atypical. Engstrom did not analyze any elections in surrounding Chatham County.

b. Senate District 12 [57]

i. Elections for State Senate

Engstrom analyzed the 1996 and 1998 Democratic primaries for the state Senate race in benchmark District 12. The black candidate of choice, John White, a long-time House member, narrowly lost both primaries, each time to a different white candidate. In 1996, only 10.6% of white voters crossed over to support White. Although he also lost his 1998 Senate bid, white crossover climbed to a more respectable 17.5%.

ii. Statewide Elections

Engstrom's analysis of the statewide races in District 12 shows a plurality of white voters crossing over to vote for black candidates. In the Democratic primaries and runoff, crossover voting ranged from 33.5%, in the Labor Commissioner primary (where there were more than two candidates), to 58% in the Public Service Commissioner

[57] Statistics in this section are taken from the King's Ecological Inference methodology column in Def. Ex. 611, Table 2.

primary. For the two remaining Democrat-only races, 44.1% of whites voted for the black candidate for Insurance Commissioner, and 40.8% voted for the black candidate for Labor Commissioner in the runoff.

In the general elections, the black candidate for Insurance Commissioner received 23.8% of the white votes cast. However, the black candidate for Labor Commissioner received 48.1% of white votes, in a race against a white Republican, and 44.6% of whites crossed over to vote for the black candidate for Attorney General.

These results are based on votes cast within the boundaries of benchmark Senate District 12. Engstrom's re-aggregation analysis, which looks at votes cast within the boundaries of the proposed district, shows that the black candidate for Insurance Commissioner would have narrowly lost, but all other candidates but one would have received a majority of votes cast. [58]

iii. Local Elections

With respect to District 12, Engstrom analyzed three types of local elections: partisan races for state House seats, partisan races for elected positions in Dougherty County, and the mayoral race in Albany, which he described as partisan in some years and non-partisan in others.

In the House races, white crossover ranged from 9.9% to 17.1%.[59] Three of the four House races involved the same

[58] In the multi-candidate primary race for Labor Commissioner, the black candidate would have received 42.6% of the votes, more than any other candidate in the primary but less than a majority.

[59] John White received 17.1% of the vote when he ran for election to the House in 1994, predating the negative publicity he received in 1996 for forming a lobbying company to trade on his political connections. This suggests that 17% white crossover may be typical for candidates like White, and the 1996 Senate primary aberrational.

black candidate, Roberts, while John White ran in the fourth race. In the two county-wide races in Dougherty County—Democratic primaries for the chair of the county commission and for county coroner—white crossover was 9.4% and 21.3%, respectively.

Engstrom analyzes four mayoral races in Albany: the partisan 1993 general election,[60] the 1995 Democratic primary, the 1997 non-partisan general election, and the 1999 non-partisan general election. In the 1995 primary, Engstrom estimates white crossover votes for the two black candidates totaled 4.8%, with the stronger candidate receiving 4.0%. In the 1997 race, white crossover for the black candidate was 5.4%. In 1999, the four black candidates in the race received 12.8% of white votes cast, with the strongest candidate receiving 9.7%. Even though white support for black candidates remained under 10% in the mayoral elections in Albany, throughout the 1990's white support for black candidates steadily increased.

c. Senate District 26[61]

i. Elections for State Senate

There have been no black-white contests for the seat in Senate District 26 under the current benchmark plan. Senator Brown was initially elected in a 1991 non-partisan special election, when African-Americans were a minority of registered voters, garnering 56% of the vote to defeat a credible white opponent. See ante at 79.

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[60] The 1993 election is outside the normal scope of Engstrom's analysis. In that race, a black candidate ran as a Republican and received 3.1% of white votes and 42.1% of the black vote. In that election, the white Democratic opponent was the candidate preferred by both black and white voters.

[61] Statistics in this section are taken from the King's Ecological Inference methodology column in Def. Ex. 611, Table 3.

ii. Statewide Elections

In all seven state-wide races between black and white candidates, white voters in benchmark Senate District 26 demonstrated considerable support for black candidates. In the Democrat-only races, the black candidate for Labor Commissioner received 33.6% of white votes in the multi-candidate primary, and 36.9% in the two-person runoff. The black candidate for Insurance Commissioner garnered 41.5% of white votes cast, and 57.4% of white voters supported the black candidate for Public Service Commissioner.

In the general elections, 32% of whites voted for the black candidate for Insurance Commissioner, 46.9% voted for the black candidate for Attorney General, and 54.9% voted for the black candidate for Labor Commissioner. In Engstrom's re-aggregation analysis, looking at how voting patterns would play out in the proposed Senate District 26, black candidates received the majority of votes in every two-person race, and received more than 60% of the vote in five out of the six races. In the multi-candidate primary, the black candidate was the top vote-getter, with 49.6% of white support.

iii. Local Elections

The Department's expert analysis of local elections in Senate District 26 addressed partisan elections in Bibb County and in Macon. White crossover voting in local elections in Senate District 26 is generally higher than in either Senate District 2 or 12.

In races for seats on the Bibb County Board of Education, two different black candidates each received 34.2% of white votes, in general elections held in 1994 and 1998. A black candidate for district attorney received 16.6% of white votes in the Democratic primary. But in the Democratic primary for the county Board of Commissioners, only 2.7% of white voters supported the black candidate.

In Macon, Engstrom's data shows that white support for three different black candidates for at-large city council seats ranged from 14.2% in the 1995 general election, to 22.9% in the 1995 general election, to 27.4% in the 1999 general election. However, in the 1999 Democratic mayoral primary, only 10.4% of whites supported the black candidate.

4. Testimony of Lay Witnesses

The Department of Justice has presented testimony, in the form of declarations, from nineteen local public officials and other community leaders who reside in the disputed Senate districts. *See* Def. Exs. 501-519. On their face, these declarations paint a grim picture of racially polarized voting in the three Senate districts, and cast doubt on the ability of African-Americans to elect candidates of choice in each of the districts as redrawn. However, the credibility and probative value of this testimony is seriously compromised by significant contradictions between these stark declarations, the more nuanced testimony of these witnesses when cross-examined in their depositions, and the actual results in local elections.

a. Senate District 2

The Department offers testimony of ten witnesses from this district, all of whom aver that racially polarized voting will prevent black candidates from succeeding in proposed Senate District 2. The most important testimony comes from Senator Thomas. [62] As the incumbent in Senate District 2, her views on racial voting patterns, and her potential and the potential of future candidates of choice to be elected in the proposed district, deserve thoughtful consideration. Senator Thomas opposes the Senate plan because it removes parts of her

[62] Senator Thomas did not provide a declaration, but was deposed in person by the parties. *See* Def. Ex. 704.

current district, despite its underpopulation, particularly voters who had previously supported her; and also because it divides Chatham County among three senators instead of the present two. Thomas Dep. at 82-83. She further testified to her understanding that proposed Senate District 2 has a BVAP under 50%, and that generally, "when you have your numbers below 50 percent black voting age population then nine times out of ten you're going to get a white representative or senator." *Id.* at 102. Senator Thomas perceives that her BVAP numbers are lower than other African-American senators, which unfairly disadvantages minority voters in her district, but testified she would have opposed the plan even if her numbers were equivalent, due to the addition of a third senator in the county. *See id.* at 125.

Senator Thomas concedes that her narrow margin of victory in the 2000 special election, which she won by 70-odd votes, was likely for reasons other than racially polarized voting. She was opposed by a popular, well-qualified white candidate, Dana Braun, who had previously served as an at-large alderman in the city of Savannah. Braun was substantially better-funded and was endorsed by African-American elected officials and ministers, while not a single black elected official endorsed Senator Thomas. *See id.* at 22, 142-143.

Despite the reduction in BVAP, Senator Thomas thinks she personally can win the proposed district. *See id.* at 121. She was less optimistic about the chances of any successor, because "people may not know them. They may not have any name recognition, and I think for the most part a minority would not win because, as I said earlier whites are more in tune with whites." *Id.* at 122.

The Department also presented declarations from four African-American Savannah aldermen: Gwendolyn Goodman, Edna Branch Jackson, Clifton Jones, Jr., and David Jones. Two African-American Chatham County Commis-

sioners, Harris Odell, Jr. and Joe Murray Rivers, also testified in opposition to the plan. Additionally, three local citizens who are active members of the NAACP testified against the plan: Dr. Prince Jackson is a former vice president of the board of education and a former president of Savannah State College, Richard Shinhoster is the acting president of the Savannah branch of the NAACP, and Helen S. Johnson is the CEO of the local civil rights museum and a member of the Executive Committee of the Savannah branch of the NAACP. These African-American community leaders in Senate District 2 are fairly confident that the more progressive white voters in Savannah's historic neighborhoods will continue to vote for the better candidate, irrespective of race, and are primarily concerned that the addition of heavily white and heavily Republican precincts from the islands area could cause Senator Thomas to be defeated by a Republican challenger. Goodman testified that white voters, at least in her ward, vote primarily on a candidate's ability. Goodman Dep. at 29. Clifton Jones, in his declaration, refers to a "general rule" that white voters prefer white candidates, C. Jones Decl. P 8, but believes that he has received the support of roughly 40% of the white voters in his ward. C. Jones Dep. at 11-12. David Jones affirms that there are white citizens in Savannah who will vote for a black candidate over a white candidate. D. Jones Dep. at 19. Johnson stated in her declaration that "racially polarized voting patterns . . . usually" occur in Savannah elections, H. Johnson Decl. P 3, but explained in her deposition that "people don't really vote because of racial issues . . . in the city elections. . . . [They vote] on the issues and I think the parties, different parties." H. Johnson Dep. at 41.

There is evidence that black voters in Savannah have been able to form political coalitions with the city's Jewish community. *See* Odell Dep. at 26; E. Jackson Dep. at 17. Additionally, African-American candidates who are Roman

Catholic draw support from white Catholics in the Chatham County area. *See* Goodman Dep. at 33; P. Jackson Dep. at 8. The city's white political establishment has shown some willingness to advance African-American candidates, most notably in the endorsement of a black mayoral candidates by Savannah's long-serving white mayor. *See* E. Jackson Dep. at 96; H. Johnson Dep. at 40. In two recent city elections, white candidates made racist remarks about their African-American opponents, but those appeals were unsuccessful and rebounded to harm the white candidate among white voters. *See* E. Jackson Dep. at 78, 80; D. Jones Dep. at 24; P. Jackson Dep. at 30.

In terms of white crossover in the greater Chatham County area, Odell thought that Senator Thomas "would pick up the overwhelming majority of the lower middle income white voters" in an election in the proposed district. Odell Dep. at 25. Rivers testified that he draws white votes in Savannah and Chatham County, and speculated that he could garner a majority even in overwhelmingly white Tybee Island "because I have a lot of people I know out on Tybee." Rivers Dep. at 42-43. Prince Jackson received white support when he defeated a white candidate in a 1970 election to the Savannah-Chatham County Board of Education. P. Jackson Dep. at 7-8. He estimates that 20% of white voters will typically cross over for a black candidate and that 70% to 80% of white voters might support a very strong black candidate. *See id.* at 11, 62. "I would say 20 to 30 percent of people . . . haven't gotten to the point where they can vote for the other race." *Id.* at 58.

Blanket statements in the declarations questioning Senator Thomas' electability in the proposed district are significantly qualified by witnesses' deposition testimony. In his declaration, Clifton Jones stated that Senator Thomas "probably will not be able to win against a strong white opponent." C. Jones Decl. P 21. In his deposition, although

stating Senator Thomas "would have a better chance under the old plan," he agreed that she had a fair chance of winning in the proposed district. C. Jones Dep. at 48. In his declaration, Shinhoster stated that it was "unlikely that Senator Regina Thomas will be reelected from proposed Senate District 2," Shinhoster Decl. P 16, but in his deposition expressed the opinion that Senator Thomas "would be a strong candidate for re-election." Shinhoster Dep. at 28.

Much of the concern about Senator Thomas' election chances are based on party politics, rather than race. David Jones clarified that he believes the proposed district throws her "into the fire," D. Jones Decl. P 5, because "Regina runs as a Democrat [and] they put her in a white Republican district as they extended her district." D. Jones Dep. at 14. Odell, who stated in his declaration that Senator Thomas "would be beaten badly" by a strong white candidate, Odell Decl. P 12, clarified in his deposition that he believed Senator Thomas would win the Democratic primary but lose in the general election to a white Republican.[63] Odell Dep. at 24.

In their depositions, several of the local leaders were more sanguine about the prospects of African-American candidates other than Senator Thomas than their declarations had indicated. Goodman believes that a well-known black politician, such as herself or Savannah's African-American mayor, Floyd Adams, would "get a fair shot" in the proposed Senate district. Goodman Dep. at 32. Rivers seconded

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[63] Proposed Senate District 2 would be heavily Democratic. Data from all of the precincts that will comprise the proposed district indicates that 64.41% of those voters supported Al Gore, 67.84% voted for Governor Barnes, and more than 70% supported the African-American Democratic candidates in the elections for statewide offices discussed supra. *See* Pl. Ex. 2D. In a district so heavily tilted towards Democratic candidates, it may reasonably be inferred that Senator Thomas is likely to face a stiffer challenge in the primary than in the general election.

Goodman's opinion that she could be elected to the new Senate seat, although he believed she was an exceptional candidate. Rivers Dep. at 47.

b. Senate District 12

The Department offers the testimony of five black declarants from Senate District 12: Charles Sherrod, John White, Arthur Williams, David Williams, and William Wright. Sherrod is a former Albany city commissioner, who unsuccessfully ran for the District 12 Senate seat in 1992, and acted as White's campaign adviser in his 1996 and 1998 election efforts for the same seat. White served in the state House for 22 years, and was defeated in the 1996 and 1998 Democratic primaries for the Senate seat by white opponents. Arthur Williams is a member of the Albany city council, representing Ward 3. David Williams is also a city council member, for Ward 6. Wright is a former president of the local NAACP branch, and unsuccessfully ran for election to the county board of commissioners and county board of education.

Senate District 12 presents a somewhat unusual situation. The district is currently represented by a white incumbent, Michael Meyer von Bremen, who was not supported by a majority of black voters in his 1998 election. The concern of local African-American politicians in this district is not the retention of an incumbent, but rather the ability of a minority challenger to defeat Meyer von Bremen.[64]

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[64] Although two of the Department's witnesses from Senate District 12 complained Meyer von Bremen did not adequately represent the interests of the African-American community, a Clark University study based on the voting records of Senate members found that Meyer von Bremen consistently voted with the Senate Black Caucus. See United States' Response to Plaintiff's Post-Trial Proposed Findings of Fact and Conclusions of Law P 489.

Sherrod attributes his defeat and White's defeat to racial bloc voting. *See* Sherrod Decl. PP 6-10. In his declaration, Sherrod stated that "most white voters in Southwest Georgia simply will not vote for black Senate candidates." *Id.* P 11. When pressed to explain the success of two African-American judicial candidates in majority-white Dougherty County, as well as Sanford Bishop's ability to be re-elected to Congress in a majority-white district which includes Senate District 12, Sherrod fell back on "a phenomenon down here in south Georgia that we can't explain sometimes," that occurs when white voters support black candidates. Sherrod Dep. at 97.

John White's explanation of his losses in the Senate primaries, in both his declaration and deposition testimony, focused less on race and more on political factors. White faced the current Lieutenant Governor, Mark Taylor, in the 1996 primary, and Taylor substantially outspent him in the campaign. *See* White Decl. P 12. White also suffered adverse publicity in that race, when the local and Atlanta newspapers reported that he had founded a company called "Connections Unlimited" to capitalize on his 22-year service in the state House. Possibly as a result, White attracted few crossover voters, and more than a third of black voters supported his white opponent. White also cited racial appeals by Taylor in the 1996 primary, *see id.* PP 12-13, without quantifying the harm to his campaign. City council member Arthur Williams suggests that White lost in 1996 because Taylor was better-funded and played "the race card." A. Williams Decl. P 6.

In the 1998 primary, which featured no such distractions, White believes he lost to Meyer von Bremen because of weak turnout among black voters. "I think some black people did not turn out to vote because they figured I was a sure bet to win." White Decl. P 15.

c. Senate District 26

Five witnesses for the Department offered testimony in opposition to the proposed plan as it pertains to Senate District 26: Albert Abrams, the African-American president of the Bibb County Board of Education; William Barnes III, an African-American member of the Bibb County Board of Education; Bert Bivins III, an African-American county commissioner for Bibb County; C. Jack Ellis, the African-American mayor of Macon; and Samuel F. Hart, an African-American county commissioner for Bibb County. In Senate District 26, the declarants' concerns about racially polarized voting are contradicted by the success of their own candidacies.

Abrams testified that, in his personal experience, "voting patterns are polarized along racial lines" in Bibb County, Abrams Decl. P 6. He acknowledged in his deposition that his personal experience includes being elected, with substantial white support, against a qualified white candidate in a county with 43% BVAP. Abrams Dep. at 15-22. Barnes defeated a white Democrat in the primary and a white Republican in the general election, winning nine out of ten precincts. Barnes Decl. P 2. In Hart's election bid, whites not only voted for him, but also sponsored campaign events for him in their homes, although he is not certain he would have enjoyed the same support if his opponent had been white. Hart Dep. at 24-25.

Testimony from these witnesses indicates that it is likely that Robert Brown can be elected in the redrawn district. Hart stated that Senator Brown "is a shoo-in for winning re-election in proposed Senate District 26," Hart Decl. P 9, and other local political figures agree that Senator Brown retains at least a good chance of being elected. *See* Abrams Decl. P 7; Barnes Decl. P 7; Ellis Decl. P 7. The local political leaders are more concerned that the redrawn district will compromise the ability of African-American candidates other

than Senator Brown to be elected. Ellis believes "a non-incumbent minority candidate would have only a 50/50 chance of winning in proposed Senate District 26." Ellis Decl. P 9.

However, in their deposition testimony, local political leaders from Senate District 26 identified a pool of black candidates who could succeed Robert Brown. Abrams agreed that Ellis, as well as several African-American city council members, would be formidable candidates if any opted to run for the state Senate. Abrams Dep. at 61. Barnes believes an African-American candidate could be elected from a Macon-based district with a 50% BVAP. Barnes Dep. at 59. Hart described a pool of potential African-American candidates who could, like Abrams, "draw across the board" in Bibb County, Hart Dep. at 41, as well as potentially attract the same level of white crossover that Senator Brown enjoyed in his 1991 election. *Id.* at 44, 51-52.

II. Analysis

Section 5 requires that certain jurisdictions, Georgia among them, obtain preclearance from the Department of Justice or a three-judge panel of the United States District Court for the District of Columbia before implementing any change in a "qualification, prerequisite, standard, practice, or procedure" with respect to voting, including redistricting and reapportionment, to ensure that the proposed change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c.

In determining whether Georgia is entitled to preclearance under § 5, we must determine on the basis of the facts "whether the ability of minority groups to participate in the political process and to elect their choices to office is augmented, diminished, or not affected by the change affecting voting . . . ." H.R. Rep. No. 94-196, p. 60, quoted in

Beer v. United States, 425 U.S. 130, 141, 47 L. Ed. 2d 629, 96 S. Ct. 1357 (1976). There is no retrogression, as defined by the congressional committee and reiterated in Beer and subsequent opinions, where a redistricting plan augments or has no effect on the voting power of a minority group; retrogression occurs only if a plan diminishes "the position of racial minorities with respect to their *effective* exercise of the electoral franchise." *Beer*, 425 U.S. at 141 (emphasis added). Neither the text of § 5 nor authoritative decisions interpreting it require the preservation of super or "robust" majorities that would guarantee election of the minority candidate of choice; the statute and precedents "merely mandate[] that the minority's *opportunity* to elect representatives of its choice not be diminished, directly or indirectly, by the State's actions." *Bush v. Vera*, 517 U.S. 952, 983, 135 L. Ed. 2d 248, 116 S. Ct. 1941 (1996) (emphasis added).

Opportunity does not necessarily equate to probability, although the majority so holds. See ante at 127, 131-132. Each majority-minority district (and in some cases, districts with a substantial minority population less than a majority), represents an opportunity for a minority candidate of choice to be elected. The majority, rather than comparing the number of majority-minority districts or the number of minority candidates of choice likely to be elected under the benchmark and proposed plans as the measure of opportunity, look to the probability that a minority choice candidate will be elected in each district, specifically whether the chance that a minority candidate of choice will be elected has decreased from a "robust" chance to "a 'reasonable' or 'fair' chance." *Id.* at 118.

There is no legal authority for the majority's proposition that § 5 requires that a plan preserve a pre-existing probability that a minority choice candidate prevail. To the contrary, the Supreme Court, albeit in the § 2 context, has consistently held that the Voting Rights Act aims to provide nothing more than

a fair or equal opportunity, and does not guarantee "safe" seats or a "robust" chance of victory.[65] Other lower courts have recognized, in the § 5 context, that a plan that preserves or increases the number of districts where minority voters have an equal or reasonable opportunity to elect their candidates of choice is not retrogressive. *See Colleton County Council v. McConnell*, 2002 U.S. Dist. LEXIS 10890 *110, No. 01-3581-10 (D.S.C. Mar. 20, 2002) (three-judge court) (examining the number of majority-minority districts maintained "at a level of equal opportunity"); *see* also *Ketchum v. Byrne,* 740 F.2d 1398, 1419 (7th Cir. 1984) (defining retrogression as a decrease in "the number of wards in which blacks have a reasonable opportunity to elect a candidate of choice."). This does not conflate a § 5 inquiry with a § 2 inquiry. Rather, it recognizes that a simple comparison of the number of majority-minority districts under the benchmark and proposed plans, although traditionally employed by the courts, is by itself insufficient because it fails to answer the question of whether the majorities are at a level that enables "*effective* exercise of the electoral franchise," *Beer*, 425 U.S. at 141 (emphasis added).

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[65] In the context of § 2, it is clear that the purpose of the Voting Rights Act is to provide an "equal" or "fair" opportunity. "The most natural reading of that language would suggest that citizens have an equal 'opportunity' to participate in the electoral process and an equal 'opportunity ' to elect representatives when they have been given the same free and open access to the ballot as other citizens and their votes have been properly counted. The section speaks in terms of an opportunity—a chance—to participate and to elect, not an assured ability to attain any particular result." *Holder v. Hall,* 512 U.S. 874, 925, 129 L. Ed. 2d 687, 114 S. Ct. 2581 (1994) (Thomas, J., concurring); see also *Miller v. Johnson,* 515 U.S. 900, 927, 132 L. Ed. 2d 762, 115 S. Ct. 2475 (1995) (the Act seeks to provide "equal opportunity to gain public office regardless of race"); *Voinovich v. Quilter,* 507 U.S. 146, 155, 122 L. Ed. 2d 500, 113 S. Ct. 1149 (1993) ("Only if the apportionment scheme has the effect of denying a protected class the equal opportunity to elect its candidate of choice does it violate § 2.").

A majority of the Supreme Court has never definitively answered the question of whether a redistricting plan that preserves or increases the number of districts statewide in which minorities have a fair or reasonable opportunity to elect candidates of choice is entitled to preclearance, or whether every district must remain at or improve on the benchmark probability of victory, even if doing so maintains a minority super-majority far in excess of the level needed for effective exercise of electoral franchise. *Cf. City of Richmond v. United States,* 422 U.S. at 371 (in the context of annexation, § 5 does not require the maintenance of the same number of minority-controlled city council seats, when doing so would "permanently overrepresent[]" minority voters). However, in *United States v. Mississippi,* 444 U.S. 1050, 62 L. Ed. 2d 739, 100 S. Ct. 994 (1980), the Supreme Court summarily affirmed a decision by a three-judge panel of this court, *Mississippi v. United States,* 490 F. Supp. 569 (D.D.C. 1979) (Wilkey, Pratt and Greene, JJ.),[66] granting preclearance to Mississippi's reapportionment plan, with Justice Marshall dissenting. Although the lower court found no retrogressive effect because "both plans had the same number of districts with Negro voting-age populations of 60% or more," 444 U.S. at 1058,[67] Justice Marshall nonetheless would have held that the proposed plan had a retrogressive effect because it decreased the BVAP is certain

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[66] Judge Harold Greene, as chief of the appellate section of the Civil Rights Division of the Department of Justice, was a principal draftsman of the Voting Rights Act as well as the Civil Rights Act of 1964.

[67] The three-judge court made a finding that a "Negro voting-age population of 60% was necessary in order for Negroes to have a *fair opportunity* to elect a candidate of their choice." 444 U.S. at 1056 (emphasis added) (Marshall, J. dissenting). Justice Marshall did not disagree with the fair opportunity analysis, but thought the BVAP percentage necessary to provide a fair opportunity in rural counties was in excess of 65%. *See id.* at 1057.

districts: in Leflore County from 71.72% to 64.26%, in Marshall County from 62% to 56%, and in Adams County from 70% to 63%. *See id.* at 1058 & n.6. Although Justice Marshall would have required the maintenance of BVAP majorities at a certain percentage, rather than at a certain probability of election, there is a linkage between the two: a higher BVAP results in at least an incrementally higher probability of electoral success. See ante at 129-130. The outcome in Mississippi, although not binding precedent on this three-judge court, nonetheless squarely rejects the position adopted here by the majority, that a plan may be found retrogressive due to declines in individual districts, even though the plan as a whole, such as the Senate plan here, maintains minority voting strength statewide at levels equivalent to the benchmark plan.

Georgia bears the burden of proving, by a preponderance of the evidence, that its Senate and other redistricting plans are consistent with § 5 of the Voting Rights Act, but its burden is a limited one. A redistricting plan may be precleared under § 5, yet still be "enjoined as unconstitutional," *Shaw v. Reno,* 509 U.S. 630, 654, 125 L. Ed. 2d 511, 113 S. Ct. 2816 (1993), or result in vote dilution actionable under § 2 of the Voting Rights Act, *see Reno v. Bossier Parish Sch. Bd.,* 528 U.S. 320, 335, 145 L. Ed. 2d 845, 120 S. Ct. 866 (2000) ("Bossier Parish II").[68] "In vote dilution cases § 5

[68] In the Bossier Parish decisions, the Supreme Court emphasized that a jurisdiction seeking preclearance under § 5 need not prove that its plan satisfy § 2's more stringent vote dilution requirements. "To require a jurisdiction to litigate whether its proposed redistricting plan also has a dilutive 'result' before it can implement that plan—even if the Attorney General bears the burden of proving that 'result'—is to increase further the serious federalism costs already implicated by § 5." *Reno v. Bossier Parish Sch. Bd.,* 520 U.S. 471, 478, 137 L. Ed. 2d 730, 117 S. Ct. 1491 (1997) (internal citation omitted) ("Bossier Parish I"). The Supreme Court did not consider the converse issue of whether a plan that is not vote-

prevents nothing but backsliding, and pre-clearance under § 5 affirms nothing but the absence of backsliding." *Id.*

It follows from these principles that there is no retrogression where, as here, the facts establish "sidesliding" rather than "backsliding." No precedent addresses this kind of "sidesliding," occurring where as here the BVAP majority in a proposed district proves the be less than in the prefiguration, but the new alignment increases the number of BVAP districts statewide and retains the level African-American representation in the Senate. The proposed plan in comparison to the benchmark plan is more likely than not likely (1) to create statewide as many or more majority-minority districts, as measured by BVAP; and (2) to make it reasonable to anticipate that the number of successful minority candidates statewide will equal or exceed the number elected under the benchmark plan.

A. Retrogressive Effect

Today, we face an unprecedented, yet not unforeseen, challenge: to assess whether a deliberate reduction of black super-majorities, undertaken with the endorsement of African-American legislators with the reasonable expectation that these bare majorities, in combination with meaningful white crossover voting, would have the effect of enhancing or preserving minority voting strength statewide, is nonetheless retrogressive because it reduces the BVAP in three contested Senate districts to just above fifty percent.

Although a majority of the Supreme Court has not faced the issue, leaving us on uncharted ground, individual Justices have foreseen a situation such as this. When the Supreme

dilutive under § 2, because it preserves a fair or equal opportunity for minority candidates of choice to prevail, may nonetheless be retrogressive under § 5.

Court introduced the concept of retrogression in Beer, Justice Marshall recognized that "it will not always be so easy to determine whether a new plan increases or decreases Negro voting power relative to the prior plan," anticipating situations where the effectiveness of minority voters could be reduced by "packing" them into districts where their votes would be wasted: "Is it not as common for minorities to be gerrymandered into the same district as into separate ones?" *Beer, 425 U.S. at 156 n.12* (Marshall, J., dissenting). Justice Thomas, discussing the trade-off between a high percentage of minorities within certain districts and minority influence statewide, stated that:

> We have held that a reapportionment plan that "enhances the position of racial minorities" by increasing the number of majority-minority districts does not "have the 'effect' of diluting or abridging the right to vote on account of race within the meaning of § 5." But in so holding we studiously avoided addressing one of the necessary consequences of increasing majority-minority districts: Such action necessarily decreases the level of minority influence in surrounding districts, and to that extent "dilutes" the vote of minority voters in those other districts, and perhaps dilutes the influence of the minority group as a whole.

Bossier Parish I, 520 U.S. at 490 (Thomas, J., concurring) (internal citation omitted).

"Retrogression" is an often-used but ill-defined term, not just by the parties in this case, but in the case law as well. [69]

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[69] It may be easier to define what retrogression is *not*. For example, § 5 does not require, as intervenors suggest, that retrogression be evaluated on a district-by-district as well as statewide basis, with any decrease in minority population or BVAP of an individual district deemed fatally retrogressive. *See Ketchum*, 740 F.2d at 1414 (rejecting a similar approach as "too inflexible an approach to the practical needs of redistricting").

As Judge Sullivan has pointed out, the number of majority-BVAP districts in the proposed plan "may be a more appropriate number to consider in determining whether a district is properly characterized as a 'majority-minority' district," ante at 124, although it is not a measure to rely on exclusively. *See id.*. Other judges have used the number of elected candidates of choice as a gauge of black voters' ability to exercise effectively their electoral franchise under the benchmark and proposed plans. See, e.g.,*Holder,* 512 U.S. at 895-903 (Thomas, J., concurring). These numerical measures, without more, may or may not finally determine whether or not a plan is retrogressive. But, in any event, analysis of these numerical measures is a necessary predicate to the conclusive fact decision: the effect of a proposed plan on the minority's ultimate ability to exercise its franchise effectively.

1. Defining Effective Electoral Strength

There are three different ways to define a district as majority-minority: by its total population, by its voting-age population, and by registration. Under the first measure, Georgia's proposed Senate plan is not numerically retrogressive in the sense that the number of districts where African-Americans comprise a majority of the total population remains constant at thirteen. If BVAP is used as the relevant measure, the proposed plan is numerically ameliorative, increasing the number of districts with a majority BVAP by one, from twelve to thirteen. [70] But if

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[70] Georgia and the Department of Justice have proposed two competing methods for calculating BVAP. With all due deference to the Department's guidelines, see *Bossier Parish I*, 520 U.S. at 483, the Department's definition of black voting age population is unreasonable. For the first time, respondents to the 2000 census were permitted to identify themselves as belonging to more than one racial or ethnic group. The Department counts towards BVAP those who self-identify as black,

black voter registration is the appropriate measure, than the proposed plan is retrogressive, diminishing the number of majority-black districts by five.

The Supreme Court has not expressed a clear preference for any of the three measures. In *Beer*, the Supreme Court found that a plan that increased the number of districts with a majority black population from one to two, and increased the number of districts with a majority of black registered voters from zero to one, was ameliorative. *See Beer*, 425 U.S. at 141-142. Without "expressing any opinion on the subject," the Court reiterated the trial court's dilemma in determining whether registration or voting age population was a superior measure: Registration created a greater likelihood of electoral success, but "'in essence condones voter apathy.'" *Abrams v. Johnson*, 521 U.S. 74, 94, 138 L. Ed. 2d 285, 117 S. Ct. 1925 (1997) (quoting *Johnson v. Miller*, 922 F. Supp. 1556, 1568 n.18 (S.D. Ga. 1995)); *see also Johnson v. De Grandy*, 512 U.S. 997, 1018, n.14, 129 L. Ed. 2d 775, 114 S. Ct. 2647 (1994).

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or black and white, but excludes those who self-identify as black in combination with a racial or ethnic group other than white. Georgia includes all of those who self-identify as black, whether exclusively or in combination with any other racial or ethnic group, in its BVAP figures. Georgia presented unrefuted testimony from Dr. Roderick Joseph Harrison, former chief of the Racial Statistics Branch at the U.S. Census Bureau, that the Department's allocation rule is not justified as a matter of statistics, empirical evidence, or other considerations, such as communities of interest. See Pl. Ex. 26.

Resolution of this methodological dispute is critical to this analysis, because the exclusion or inclusion of the small group of citizens who provided multi-racial responses on their census forms directly impacts on whether Georgia's proposed Senate plan, in terms of the number of districts it creates with a majority BVAP, is numerically retrogressive or numerically ameliorative. I find that Georgia's method for calculating BVAP is superior to the Department's.

Here, I would follow the majority of lower courts that have embraced voting age population as the relevant ingredient of minority voting strength in Voting Rights Act litigation. Other courts have "consistently relied" on BVAP percentage in § 5 cases. See ante at 122. "In analyzing the racial fairness factor, the voting age population (VAP) is the relevant number to be used in determining whether minorities in a particular district will be able to elect a candidate of their choice." *DeGrandy v. Wetherell*, 794 F. Supp. 1076, 1084 (N.D. Fla. 1992); *see also NAACP v. Fordice*, 252 F.3d 361, 364 (5th Cir. 2001); *Emery v. Hunt*, 272 F.3d 1042, 1044 (8th Cir. 2001); *Old Person v. Cooney*, 230 F.3d 1113, 1122 (9th Cir. 2000); *Solomon v. Liberty County Comm'rs*, 221 F.3d 1218, 1224 (11th Cir. 2000). Two other three-judge courts, in determining whether their court-ordered redistricting plans met § 5 requirements, have used voting age population as the relevant statistic. *See Smith v. Clark*, 189 F. Supp. 2d 529, 2002 WL 313216, at (S.D. Miss. 2002); *Colleton County*, 2002 U.S. Dist. LEXIS 10890, No. 01-3581-10, slip op. at 96.

Courts have adopted minority voting age population as the relevant measure of electoral strength for both practical and normative reasons. The vast majority of experts, as in this case, base their statistical analyses on voting age population. Voting age population is readily determined from census data, and although variable over time, is not as mutable as voter registration data. See ante at 123.

A state, in drawing its districts, controls the percentage of minorities of voting age population placed in that district. But those minorities, not the state, control, as a matter of individual choice and as a function of political organization through registration drives and the like, the percentage of registered minority voters.[71] Section 5 prevents any

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diminution in the minority's opportunity to elect representatives of its choice caused "by the State's actions." *Bush v. Vera*, 517 U.S. at 983. By its terms, the phrase "effective exercise of electoral franchise" implies that it is not the role of Georgia, or any other state, to create districts that minority voters can win even when substantial segments of voting-age adults fail to register or, having registered, stay home on election day. "Accounting for lower voter registration and turnout rates among black citizens when determining what constitutes an 'equal opportunity to participate in the electoral process' and creating 'safe black districts' to compensate for those rates amounts to an incentive for and institutionalization of black voter apathy." *Johnson v. Miller*, 864 F. Supp. 1354, 1392 (S.D. Ga. 1994) (quoting *Thornburg v. Gingles*, 478 U.S. 30, 44, 92 L. Ed. 2d 25, 106 S. Ct. 2752 (1986)).

The fact that a district has a certain percentage of voting-age African-Americans does not guarantee that the same percentage of voters will be African-American. The percentage of registered voters who are African-American may be higher or lower than the BVAP, although that variation is generally within a few percentage points, and turnout among black and white registered voters varies from election to election. In ten of the twelve benchmark districts with a BVAP majority, including Senate Districts 2 and 26, the percentage of registered voters who are black is *higher* than the BVAP percentage. *See* Pl. Ex. 1E. This implies that voting-age African-Americans throughout the state are mobilized, because their registration rates are slightly in excess of white registration rates in ten of the twelve majority-minority districts.

Courts' concepts of the percentage of minority voting age population necessary to comprise an "effective" majority, cf. *Ketchum*, 740 F.2d at 1402 n.2, one that can elect minority candidates of choice, have varied over time. Until the early

1980s, conventional wisdom suggested that African-American super-majorities of 65% were needed to create effective majorities. *See Rybicki v. State Bd. of Elections*, 574 F. Supp. 1082, 1114 n.87 (N.D. Ill. 1982) ("The 65% figure is a general guideline which has been used by the Department of Justice, reapportionment experts and the courts as a measure of the minority population in a district needed for minority voters to have a meaningful opportunity to elect a candidate of their choice."); *cf. UJO*, 430 U.S. at 164 (noting that the Justice Department's conclusion that a non-white population majority in the vicinity of 65%, in order to achieve a non-white majority of eligible voters, was not unreasonable). In the intervening twenty years, there are strong indications that progress in race relations has virtually eliminated the rationale for 65% minority super-majorities. One court, applying the 65% guideline, noted presciently that "emerging changes in sociological and electoral characteristics of minority groups and broad changes in political attitudes may substantially alter, or eliminate, the need for a corrective. The 65% figure, in particular, should be reconsidered regularly to reflect new information and new statistical data." *Ketchum*, 740 F.2d at 1416.

During the 1990s, courts began to recognize that districts with 55% voting age majorities preserved effective opportunities for minority voters, *see Jeffers v. Clinton*, 756 F. Supp. 1195, 1199 (E.D. Ark. 1990), while minority voters, in certain circumstances, believed they retained effective voting power at even lower levels. *See Bush v. Vera*, 517 U.S. at 969 (in the redistricting process, "the community insisted that [a] 'safe' black district be drawn that had a total black population of at least 50%") (internal quotations omitted); *DeGrandy*, 794 F. Supp. at 1088 n.5 (African-American intervenors contended that district with less than 50% BVAP nonetheless provided African-Americans with an opportunity to elect candidates of choice). Based on the

handful of cases decided thus far in the 2000 redistricting cycle, the trend indicates that courts, under certain factual circumstances, are now willing to accept the proposition that minority voters retain the ability to exercise their electoral franchise effectively in districts with a bare, 50% majority. *See Colleton County Council*, 2002 U.S. Dist. LEXIS 10890, No. 01-3581-10, slip op. at 88, 96; *see also Page v. Bartels*, 144 F. Supp. 2d 346, 358 *(D.N.J. 2001)*.

As a related measure, the Supreme Court has considered, as a *de facto* standard for effective electoral franchise, the number of seats minority voters control. "If using control of seats as our standard does not reflect a very nuanced theory of political participation, it at least has the superficial advantage of appealing to the 'most easily measured indicia of political power.'" *Holder*, 512 U.S. at 899 (quoting *Davis v. Bandemer*, *478* U.S. 109, 157, 92 L. Ed. 2d 85, 106 S. Ct. 2797 (1986) (O'Connor, J., concurring)). Under the benchmark plan, minority voters have elected eleven candidates of choice, all African-American, from the twelve districts with majority BVAP. Black voters in benchmark Senate District 12 have been unable to elect their candidate of choice. Using this measure, the proposed plan would not be retrogressive if African-American voters retained the ability to control eleven or more seats in the state Senate.[72]

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[72] The fact that black voters in Senate District 12 may not be able to defeat the current white incumbent is not an indication of retrogression, because it represents only a continuation of the status quo—white incumbency. As another three-judge district court recently observed, "We must remember that the question is not what BVAP would be necessary to defeat a popular incumbent; the question is what BVAP is required to insure that the minority population has an equal opportunity to elect a *minority* candidate of choice in an open election." *Colleton County Council*, 2002 U.S. Dist. LEXIS 10890 at, No. 01-3581-10, (emphasis in original).

The number of majority-minority districts created by the proposed plan and the number of minority candidates of choice who can reasonably be expected to be elected from those districts does not end the inquiry into whether or not the proposed Senate plan satisfies § 5. It is also necessary in most situations to consider whether the reasonably anticipated white crossover vote will enable the numerical strength of black voters, in terms of BVAP, to translate into effective electoral strength, in terms of the ability to elect minority candidates of choice. At the bottom line, African-American voters *effectively* exercise their electoral franchise when their votes, taking into account the magnitude of the likely white crossover, will enable their candidates of choice to win, regardless of whether that victory is by a landslide or a single vote.

2. White Crossover Voting Versus Racial Polarization in the Proposed Senate Districts

Fifty percent is not a "magic number" for defining effective electoral strength. The extent to which minority voters join forces with voters of other races to elect a mutual candidate of choice is a key variable. Majority-minority districts are a necessary remedy in circumstances where white voters refuse to support minority candidates, but "in those communities in which minority citizens are able to form coalitions with voters from other racial and ethnic groups . . . minority voters are not immune from the obligation to pull, haul, and trade to find common ground." *De Grandy*, 512 U.S. at 1020. A redistricting plan that requires minority candidates to draw support from white voters is not offensive to the purposes of the Voting Rights Act, and indeed has a virtue "which is not to be slighted in a statute meant to hasten the waning of racism in American politics." Id. However, a redistricting plan that lowers BVAP majorities to the point where minority candidates of choice will likely need at least some white support to prevail effectuates the purpose of the

Voting Rights Act only where, as here, racism is waning and minority candidates can draw the necessary level of white support. See infra at 51-56.

In litigation under § 2 of the Voting Rights Act, the Supreme Court refers to racially polarized voting as voting patterns which produce elections in which a majority of whites and a majority of African-Americans each support a different candidates. This racial polarization is legally significant in a § 2 case only if "a white bloc vote . . . normally will defeat the combined strength of minority support plus white 'crossover' votes." *Gingles*, 478 U.S. at 56. It should follow, on the opposite side of this coin, that in a § 5 context, racially polarized voting is legally and practically insignificant if minority candidates of choice will likely be able to attract sufficient white crossover votes to win. Where, as here, the proposed Senate plan creates a number of districts equal to or greater than the benchmark plan in which it is likely that a sufficiently large and cohesive African-American cohort, *see id. at 50-51*, will combine with sufficient numbers of white crossover voters to create an absolute voting majority, the plan is not retrogressive in violation of § 5.

I agree that "if voting patterns are not marked by racially polarized voting,"—in other words, if there is sufficient white crossover—reductions in the percentage of minority voters "may have little or no effect on their ability to elect preferred candidates" and would evidence the absence of backsliding or retrogression. Ante at 119. However, they invoke the testimony from the Department's expert witness, Engstrom, that African-American candidates will be unable to attract the necessary level of white crossover votes to win in the proposed districts. *See id.* at 145. Engstrom has presented data from Senate races, statewide elections, and municipal and/or county elections. Although Engstrom's study uses well-accepted statistical methods, there is a large gap between

levels of white crossover voting in different types of elections that he is unable to explain. Even without considering which type of election is most probative, the mere fact that "the degree of racial bloc voting varied widely from election to election" argues against a finding that legally significant racially polarized voting exists. *Mallory v. Ohio*, 173 F.3d 377, 382 (6th Cir. 1999).

Senate elections provide the most probative results, because "elections involving the particular office at issue will be more relevant than elections involving other offices," *Magnolia Bar Ass'n v. Lee*, 994 F.2d 1143, 1149 (5th Cir. 1993), but the data sample is severely limited.[73]

The majority finds that Engstrom's analysis of local elections, which indicates only a small percentage of whites will support a black candidate, is more probative than his analysis of the district-wide returns in statewide elections. See ante at 141. Although neither the statewide nor local races are for the relevant office, the results in the state-level races reflect the voting patterns of the Senate district as a whole, rather than a discrete and possibly unrepresentative part, such as its largest city or most populous county. Additionally, municipal and county boundaries do not necessarily overlap with the boundaries of the Senate district. *See ante* at 139-141. The use of local election results to predict the level of white crossover in future Senate races is therefore highly questionable, because the former differ from the latter not only in the type of election, but also involve an incomplete, and in some cases extraneous, group of voters. *See Clark v. Calhoun County*, 21 F.3d 92, 96 (5th Cir. 1994)

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[73] Engstrom provided no data from Senate District 26, and the multiple elections in Senate Districts 2 and 12 each involved a single African-American candidate, making it impossible to discern whether the crossover rates in those elections were a race-based response or specific to those candidates.

(rejecting the use of municipal elections as a predictor of equal opportunity to elect minority candidates of choice to county-wide office).

The statewide election results in the disputed Senate districts show a much higher rate of white crossover support for black candidates than is the case in local elections in those districts.[74] When white voters in Senate Districts 2, 12, and 26 voted in statewide elections, between 23.8% and 58% cast their ballots for a black candidate over a white candidate. White crossover in statewide elections averaged 40.3% in Senate District 2, 41.8% in Senate District 12, and 43.3% in Senate District 26. At trial, Engstrom conceded that African-American candidates who receive this level of white crossover support have a "good chance" of winning election. *See ante* at 143. The Department challenges the relevance of crossover votes in statewide elections in those districts to Senate elections, arguing that white crossover voting in Senate races is more akin to voting patterns seen in local elections.

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[74] Plaintiff relies on a theory of "preference differentials" to argue that the voting patterns in statewide and local elections are not dissimilar. See ante at 143-144. Like Judge Sullivan, I am not persuaded by that theory, and find it tangential to our task in weighing the evidence, here by determining the relative value of statewide versus local elections as a predictor of racial voting patterns in the proposed Senate districts.

As an aside, I note that the differential percentages provided in footnote 46, ante, for both statewide and local elections, which range from 28% to 63%, are at a level that tends to disprove the existence of racially polarized voting. *See Clarke v. Cincinnati*, 40 F.3d 807, 816 (6th Cir. 1994) (Boggs, J., concurring) ("One excellent measure of polarized voting or white bloc voting is the difference between the percentage of whites who vote for a given candidate and the percentage of blacks who vote for the same candidate. In the classically polarized races in most of the southern voting-rights cases, this figure has tended to be 80 percent or more for almost all candidates.").

Engstrom's analysis of state-level election results in each of the contested districts, particularly his re-aggregation analysis indicating the returns in each of the statewide elections as if they had been run in the proposed districts,[75] is highly probative evidence of sufficiently high white crossover voting to enable candidates of choice to prevail. The lower rates of white crossover in local elections may be specific to those pockets of the Senate district, may be specific to the office,[76] or may be less statistically accurate due to smaller number of precincts available for analysis.[77] Any of these explanations are more plausible than a theory that white voters who refuse for racist reasons to support

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[75] Engstrom's re-aggregation analysis indicated that out of twenty-one elections, the African-American candidate won eighteen outright, received substantial pluralities in two primary races with multiple candidates, sufficient to advance to the runoff for the top two vote-getters, and lost a single election. *See* Def. Ex. 611 at 11-12.

[76] I note that, as a general rule, the lowest crossover rates are seen in elections to local executive office, in mayoral races or elections to the county board of commissioners.

[77] Engstrom's data indicates that Floyd Adams, the incumbent African-American mayor of Savannah, received only 2.8% of white votes in the election and 8.7% of white votes in the runoff when he won in 1995. The Department has also provided testimony from local politicians and community leaders in Savannah, who testified that Adams in fact received support from roughly 20% of white voters in his 1995 election. See P. Jackson Dep. at 29 ("We calculated white crossover to be somewhere in the neighborhood of 20 percent."); H. Johnson Dep. at 36; Shinhoster Dep. at 41.

At the time Adams was elected in 1995, Savannah's BVAP was less than 52% and whites were a majority of registered voters. *See* Shinhoster Dep. at 25, 36. This undercuts the Department's statistical evidence in two possible ways: either Adams in fact received 20% of the white crossover vote and Engstrom's local election data is statistically questionable, or Adams was able to win election in a city where black voters were a numerical minority with minimal white crossover.

black candidates for local office would nonetheless vote to elect black candidates to more powerful and prestigious statewide positions.[78]

To the limited extent they are relevant, local election results tend to disprove the Department's contention that levels of white crossover voting have been, and will continue to be, so low as to defeat qualified minority candidates in the contested Senate districts. In Savannah, the largest city in Senate District 2, African-Americans were a minority of registered voters during the 1995 and 1999 election cycles. *See* Shinhoster Dep. at 36. White crossover rates, according to Engstrom, were no greater than 10.6%. Nonetheless, African-Americans won two of the three runoff elections where they competed head-to-head against white candidates.[79]

In Senate District 12, African-American candidates won both elections to the state House included in Engstrom's expert report.[80] In the two Dougherty County races, one

[78] A comparison of the 16.6% white crossover rate in the district attorney election in Bibb County, and the 46.9% white crossover rate in the election for state Attorney General is illustrative. It may be that there is a cohort of white voters in Georgia who will not support a black candidate for county district attorney simply because they are racists. However, it is implausible to assume that a significant portion of those white racists would turn around and support a black candidate for state Attorney General.

[79] Floyd Adams won the mayor's race in 1995. Edna Jackson lost the election for an at-large city council seat in 1995, but won in 1999. See E. Jackson Dep. at 8. Interestingly, Engstrom's report indicates that she received an identical percentage of white votes in both races, meaning that her victory in 1999 was the likely result of relatively higher African-American turnout, and did not depend on a shift in the white voting preferences. *See* Def. Ex. 611 at 3-4 (Savannah Council At-Large, 1995 and 1999 Runoffs).

[80] White testified that he won his 1994 election to the state House with more than 70% of the vote. White Dep. at 63. I take judicial notice that

African-American candidate won, and the other lost.[81] There is no record evidence that reveals the racial makeup of the House districts. Dougherty County was majority white in 1996, but the percentage of African-American residents is increasing. *See* Sherrod Dep. at 48; White Dep. at 16; D. Williams Dep. at 66. There is no evidence in the record to indicate whether the African-American candidates in the Albany mayoral races won or lost.

In Bibb County, the dominant county in Senate District 26, at least three African-Americans have won county-wide elections.[82] Bibb County is majority-white, with approximately 43% BVAP and black voter registration of roughly 40%. See ante at 80. African-American candidates also won at least three of the four Macon city elections.[83]

Lawrence R. Roberts, the African-American candidate in House District 162, has served in the State House since 1992. *See* http://www.legis.state.ga.us/Legis/1995_96/house/gahm162.htm (visited March 22, 2002).

[81] Jane Taylor won the coroner's race and Wright lost the election to chair the county commission. *See* White Dep. at 18; Wright Dep. at 14. Wright's support among African-American voters was relatively soft, at 72.2%. In contrast, Taylor was supported by 96% of black voters. *See* Def. Ex. 611 at 7.

[82] Two of the Department's witnesses, Abrams and Barnes, currently serve on the Bibb County Board of Education and defeated white candidates to win election. Engstrom's data indicates that a third black candidate, Hutchings, received 34.2% of the white vote in his 1994 election. African-Americans therefore won two out of four elections analyzed in Engstrom's report, and won an additional countywide election not included in the data set.

[83] Jack Ellis, Macon's incumbent mayor, won the 1999 primary by six percentage points, receiving 10.4% of the white crossover voter. (Ellis Decl. P 2). I take judicial notice that Brenda Youmas was elected to the City Council in 1995 and that James Timley prevailed in his 1999 council race. http://www.cityofmacon.net/CityDept/council/members.htm (visited

These are not isolated victories, to be dismissed as aberrations, see ante at n.45; they demonstrate that the relative lack of white crossover voting that Engstrom discerns in local elections is legally and practically insignificant. To the extent these local elections are worthy of consideration, they tend to support Georgia's basic position: that African-Americans have a fair opportunity to elect candidates of their choice even in districts where the black voting age population or registered voters numbers fifty percent or less.

3. Fair Opportunity to Elect Minority Candidates of Choice

It is my view that § 5 does not prevent a state from adopting a redistricting plan, with the blessing of African-American legislators, that reduces "packed" concentrations of black voters so long as it preserves equal or fair opportunities for minorities to elect candidates of choice.[84] It may well be that super-majorities of black voters under the benchmark plan create "robust" opportunities to elect a candidate of choice. But under the law of unintended consequences, they may also create conditions that are "unfair," "unreasonable," and "unequal," to both minority voters in those districts whose votes are "wasted," to the point that they may find it unnecessary to turn out and vote, and to non-minority voters in those districts whose voting interests might well be "submerged" by the super-majority to the point

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March 22, 2002). There is no evidence to indicate whether the African-American candidate in the fourth Macon race won or lost.

[84] Indeed, if Georgia had maintained the heavy concentrations of African-American voters in certain of its Senate and House districts, particularly in the metropolitan Atlanta area, black voters in those districts may have a had a cognizable § 2 claim based on dilution of their votes through packing. *See Quilter*, 507 U.S. at 154.

that they turn away from the political process. *Cf. Gingles*, 478 U.S. at 68. The Voting Right Act does not countenance, let alone require, such a result.

The Constitution and the Voting Rights Act do not guarantee victory to minority candidates, but only equal opportunity. A state's maintenance of minority super-majorities within a particular district is required by § 5 only when necessitated by legally significant racially polarized voting, large numbers of ineligible minority voters, or other barriers to the effective exercise of electoral franchise that are outside the control of the minority group. There is "no vested right of a minority group to a majority of a particular magnitude unrelated to the provision of a reasonable opportunity to elect a representative." *Ketchum*, 740 F.2d at 1418. Moreover, the continuation of super-majorities, even when progress has been made sufficient so that minority voters are no longer "fenced out of the electoral process," *Rybicki*, 574 F. Supp. at 1139 (dissenting opinion), and no longer need the edge those super-majorities provide, diminishes their opportunity to influence elections elsewhere and "threatens to carry us further from the goal of a political system in which race no longer matters." *De Grandy*, 512 U.S. at 1029 (Kennedy, J., concurring). A proposed plan that provides a fair opportunity to elect the same or greater number of candidates of choice than the benchmark plan provides is entitled to § 5 preclearance.

4. Relative Weight Accorded to Expert and Lay Testimony

It is our responsibility, as the triers of fact, to determine the relevance, credibility, and proper weight of the evidence presented. This case need not be decided solely on the basis of expert testimony. As this trial has amply demonstrated, statistics is an inexact science, made more so by the "inherently uncertain" nature of voting behavior data. *Easley*

v. Cromartie, 532 U.S. 234, 247, 149 L. Ed. 2d 430, 121 S. Ct. 1452 (2001), and already-outdated census data, *see Abrams*, 521 U.S. at 100-101. The Supreme Court has previously noted, in a related context, that results in another Georgia election "underscore the weakness of the Justice Department's methodology of calculating the likelihood of a black-preferred candidate winning based on strict racial percentages." [85] *Id.* at 93.

Courts have no obligation to accept statistical evidence as conclusive. *See Magnolia Bar Ass'n*, 994 F.2d at 1149 ("The plaintiffs have not offered any authority, and we can find none, for their assertion that the district court may rely only on expert conclusions in determining whether white bloc voting is legally significant."). This does not mean that statistical evidence should be rejected out of hand, particularly when it is weighty and uncontradicted by testimony from other experts or lay witnesses. "In the face of a strong statistical case . . . general statements that race played no role at the polls carry little weight." *Teague v. Attala County*, 92 F.3d 283, 291 (5th Cir. 1996). While the statistics *qua* statistics in the record are meaningful, the expert opinions are flawed, contradictory, and highly varied in their consistency with the lay testimony and their own statistics; and the African-American legislators who testified in favor of the proposed plan rendered much more probative opinions.

Review of this record confirms the conclusions of other courts that the testimony of minority political leaders, particularly incumbents regarding their own districts, is highly probative evidence of the minority percentages necessary to ensure continued success in electing minority

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[85] In Abrams, the Justice Department had predicted that a minority candidate of choice would not be able to prevail in Georgia's Fourth Congressional district, which had a BVAP of 33%. Cynthia McKinney, who is African-American, nonetheless won the election.

candidates of choice. *See, e.g., Colleton County Council*, 2002 U.S. Dist. LEXIS 10890 at, No. 01-3581-10, (testimony of Congressman James Clyburn); *Ketchum*, 740 F.2d at 1415 (testimony of Congressman Harold Washington); *Rybicki*, 574 F. Supp. at 1114-1115 (crediting testimony of black aldermen that the inclusion of white neighborhoods in their wards would jeopardize their re-election chances); *cf. Wright v. Rockefeller*, 376 U.S. 52, 11 L. Ed. 2d 512, 84 S. Ct. 603 (1964) (intervention of Congressman Adam Clayton Powell).[86] n88 I therefore accord great weight to Senator Brown's support for his own district, as well as Senator Thomas' concession that she will probably win re-election in her proposed district.[87] n89 More broadly, I consider Lewis, Brown, and Walker to be witnesses with unmatched knowledge of Georgia politics and African-American voting strength, with Senator Brown and Senator Walker being especially attuned to the level of minority voting strength necessary for minority candidates of choice to win a Senate seat. I consider Epstein's statistics as reinforcement of this assessment of the political situation on the ground in Georgia, rather than the main support for the plaintiff's argument.

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[86] The Rybicki Court speculated that a three-judge district court and the Supreme Court may have upheld a redistricting plan that divided Manhattan into three heavily white Congressional districts and one heavily minority Congressional district because Powell, the African-American incumbent, intervened as a defendant in support of the proposed plan. *See Rybicki*, 574 F. Supp. at 1118 n.97.

[87] Based on Senator Thomas' testimony, I infer that her opposition to proposed Senate District 2 is based less on retrogression, and more on garden-variety political concerns: the proposed plan impinges on her political turf in Chatham County by bringing in a third senator, and makes it likely that she will have to campaign harder than in her most recent election, when she received more than 77% of the vote. Her objections are legitimate and understandable from a political standpoint, but do not implicate the Voting Rights Act.

I have also considered the testimony of the Department's lay witnesses, although I believe it pales in importance to the testimony of Lewis, Brown, and Walker and the expert witnesses. To the extent that discrepancies exist between declarations and depositions of the Department's lay witnesses, I accept the latter as more credible, because it represents the witnesses' own words, rather than the adoption of statements at least partially prepared by the counsel. The deposition testimony is also more comprehensive, and permits the witnesses to explain and elaborate on statements contained in the declarations.

B. Purpose of Georgia's Senate Plan

I agree with the majority that the Senate's purpose in advancing this redistricting plan is non-retrogressive. See ante at 166. Georgia's legislators had a dual purpose: to maintain existing minority voting strength but avoid the "waste" of black votes, and to maintain a Democratic majority in both houses of the State Assembly. *See* Meggers Dep. at 20-21. The role that African-American legislators played in drafting redistricting plans for the House, Senate and Congress, and their near-unanimous support in voting for those plans, is a reliable indication that Georgia has no retrogressive purpose.

The desire to strengthen the position of one political party relative to the other is not a retrogressive purpose, although there are circumstances, not present here, where it might have a retrogressive effect. With respect to redistricting, the interests of the Democratic party and Georgia's primarily Democratic voters are largely in tandem. Although that does not immunize the proposed redistricting plans from complying with § 5, it argues against a finding of discriminatory purpose.

III. Conclusion

I find that the testimony of Lewis, Brown, and Walker provides the State with a preponderance of evidence that

outweighs the expert testimony and the testimony of the lay witnesses who testified for the Department and intervenors. Congressman Lewis has devoted his life, and risked it more than once, to advance the cause of African-American voting rights. He would not advocate a redistricting plan that would jeopardize what he has struggled so hard to win. It is inherently incredible that Senator Brown, Senator Walker, and all but one of the African-American members of the Georgia Senate would invite this court to place their Senate seats at serious risk, or cause minority voters—who, after all, are a majority of their constituents—to lose an equal opportunity to elect the candidates of their choice. The judicially noticeable changes in the political landscape in the South in general, and Georgia in particular, from the days of "Massive Resistance" to the present, corroborate the expressed confidence of Georgia's African-American legislative leaders that the steady rise in white voter crossover from zero to substantial numbers will continue. This confirms to me that the proposed redistricting of Senate Districts 2, 12, and 26 would not cause retrogression in the ability of African-American voters in those districts and statewide to exercise their franchise effectively.

I have read the majority opinion and concurrence with care and an open mind. However, I am not persuaded by Judge Sullivan's comprehensive and well-written majority opinion or by the concurrence. Neither addresses four points I consider to be crucial to the resolution of this case.

First, a three-judge court is a trier of fact. As with a jury, judicial triers of fact may reach different conclusions about the probative value of items of evidence, including expert testimony.

Second, there is no persuasive response to my observations that the number of majority-minority districts, measured by BVAP—which I and most courts to have considered the issue find to be a highly probative gauge of minority

voting strength—increases by one from the benchmark plan, and the number of minority choice candidates likely to be elected under the proposed plan is the same as under the benchmark plan.

Third, I have not discovered any legal authority in support of the majority proposition that § 5 requires that a plan preserve a "robust" (whatever that means), pre-existing probability that a minority candidate of choice prevail, and the majority cites none. Other courts have held that a plan that preserves or increases the number of districts where minority voters have a "fair" or "equal" opportunity to elect their candidates of choice are not retrogressive. *See supra* at 34-37.

Fourth, the notion that a trial court is bound by the arguments of counsel, which may be perceived in this case as principally concerned with racial polarization, will come as a great surprise to most trial court judges. We instruct jurors that the "statements and arguments of the lawyers ... are not evidence." [88] Although it may be easier to focus our attention where the lawyers direct it, on the expert witnesses who testified live at trial, the voluminous written testimony from other witnesses is equally a part of the evidentiary record in this case. Our responsibility is to review the evidence *in toto* and assign it the weight it deserves.

Therefore, I respectfully dissent from the majority decision with respect to the Senate redistricting plan.

April 5, 2002

/s/

UNITED STATES DISTRICT JUDGE

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[88] Standardized Civil Jury Instructions for the District of Columbia at 2-5.

JUDGMENT

Pursuant to Federal Rule of Civil Procedure 58 and for the reasons stated by the court in its Opinion and Order docketed this same day, it is hereby

ORDERED and ADJUDGED that the Clerk shall enter final judgment in favor of plaintiff with respect to Georgia's State House reapportionment plan, Act No. 2EX23, and Georgia's United States Congressional reapportionment plan, Act No. 2EX11, and against defendants; and it is

FURTHER ORDERED and ADJUDGED that the Clerk shall enter final judgment in favor of defendants with respect to Georgia's State Senate reapportionment plan, Act No. 1EX6, and against plaintiff.

IT IS SO ORDERED FOR THE THREE-JUDGE COURT.

April 5, 2002
DATE

/s/ _____
EMMET G. SULLIVAN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 01-2111

THE STATE OF GEORGIA,
Plaintiff,

v.

JOHN ASHCROFT, *et al.*,
Defendants.

Before EDWARDS, *Circuit Judge*, SULLIVAN, *District Judge*, and OBERDORFER, Senior District Judge.

ORDER

On January 10, 2002, the Court granted Patrick L. Jones, Roielle L. Tyra, Della Steele and Georgia W. Benton leave to intervene as defendants in this matter with respect to the proposed State House and State Senate redistricting plans, and denied intervenors, motion with respect to the United States Congressional redistricting plan. Upon consideration of the parties' recent filings, arguments of counsel at the January 25, 2002 pretrial conference, and the relevant statutory and case law, it is hereby

ORDERED that Patrick L. Jones, Roielle L. Tyra, Della Steele and Georgia W. Benton are granted leave to intervene with respect to the United States Congressional redistricting plan; and it is

FURTHER ORDERED that the portion of the Court's January 10, 2002 Order, which denies movants' request to intervene with respect to the United Sates Congressional redistricting plan, is VACATED.

IT IS SO ORDERED FOR THE THREE-JUDGE COURT.

1/29/02

/s/

EMMET G. SULLIVAN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 01-2111

THE STATE OF GEORGIA,

Plaintiff,

v.

JOHN ASHCROFT, *et al.*,

Defendants.

Before EDWARDS, *Circuit Judge*, SULLIVAN, *District Judge*, and OBERDORFER, *Senior District Judge*.

ORDER

On January 7, 2002, Patrick L. Jones, Roielle L. Tyra, Della Steele and Georgia W. Benton renewed their motion to intervene in this matter. Movants are African-American registered voters from the State of Georgia. On December 20, 2001, this Court dismissed without prejudice movants' motion to intervene because the United States had not yet identified its legal position with respect to Georgia's request for declaratory judgment. Without an understanding of defendants' position, the Court was unable to determine whether the existing parties to this litigation adequately represented movants' interests.

On December 31, 2001, defendants filed a notice identifying their legal position. According to this notice, defendants do not contend that Georgia's proposed redistricting plan for the United States Congressional districts violates the Voting Rights Act. The United States does, however, contend that Georgia's proposed State Senate plan

violates Section 5 of the Voting Rights Act, based on its analysis of State Senate plan's proposed Second, Twelfth and Twenty-Sixth districts. The United States' position as to the State House plan is somewhat equivocal. While the United States clearly states it does not contend that the State House plan violates the Voting Rights Act, in an "Amended Identification of Issues," it suggests that it will be able to "confirm its position" by January 15, 2002.

In their renewed motion, movants seek leave to intervene as defendants in order to challenge all three proposed redistricting plans as retrogressive and in violation of Section 5 of the Voting Rights Act. Movants assert that five proposed Senate districts, including those identified by defendants, retrogress. With respect to the State House plan, movants contend that seven proposed districts retrogress.

The Attorney General has affirmatively stated that he does not contend that the United States Congressional redistricting plan proposed by Georgia violates the Voting Rights Act. As such, no real dispute exists between the parties with respect to this plan. While this Court is mindful that plaintiff bears the ultimate burden of demonstrating that the three proposed plans have neither the purpose nor effect of denying or abridging the right of minority citizens of Georgia to vote, the Court is not convinced that intervention as to the Congressional plan would be consistent with the fair and efficient administration of justice.[1] In light of the stated position of defendants, this Court will not "accommodate the intervenor[s'] quest for a forum in which to test a voting plan," which the United States does not contend violates the Voting Rights Act. *City of Dallas v. United States*, 482 F. Supp. 183 (D.D.C. 1980); *see also Morris v. Gressette*, 432

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[1] Consistent with this Court's December 20, 2001 Initial Scheduling and Pretrial Order, movants have been granted leave to file appropriate *amicus curiae* pleadings as to any additional relevant issues.

U.S. 491, 97 S. Ct. 2411 (1977) (holding that Attorney General's failure—to object to a change in voting laws subject to Section 5 was not subject to judicial review); *Harrisv. Bell*, 562 F.2d 772, 774 (D.C. Cir. 1977) (holding that no judicial review was available where individual African-American registered voters from Georgia sought to challenge the Attorney General's withdrawal of objections to a county redistricting statute); *Commisioners Court of Medina County, Texas v. United States*, 683 F.2d 435 (D.C. Cir. 1982) (noting that, in Section 5 cases, defendant-intervenor "may not continue to litigate" once the parties have settled).

With respect to the State Senate plan and, to a lesser extent, the State House plan,[2] it is clear that the Attorney General has not approved the proposed plans and that a real controversy continues to exist between the parties. As minority voters, movants allege that their right to vote will be impaired by the proposed redistricting plans. Thus, movants have demonstrated that they have standing and an interest in this case. *See Federal Election Commln v. Akins*, 523 U.S. 11, 25, 118 S. Ct. 978 (1998) (recognizing that, in voting rights cases, minimal injury satisfies the injury in fact). Movants' analysis of the State House and Senate redistricting plans identifies interests that are not adequately represented by the existing parties. Therefore, the Court grants movants' request to intervene as to the State Senate and State House plans. Fed. R. Civ. P. 24(a)(2).

For the foregoing reasons and upon consideration of the Renewed Motion to Intervene filed by Patrick L. Jones,

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[2] The Court again notes the elusive nature of the United States' position regarding the State House plan. In the event that defendants unequivocally assert that they do not contend that the State House plan violates the Voting Rights Act, this Court will rely on the same authority, which forms the basis for its denial of movants' request to intervene as to the Congressional plan.

Roielle L. Tyra, Della Steele and Georgia W. Benton, the plaintiff's and defendants' responses thereto, the relevant statutory and case law, the full record of this matter, the expedited nature of these proceedings, and pursuant to 28 U.S.C. § 2284(b)(3), it is hereby

ORDERED that the Renewed Motion to Intervene [33] is GRANTED with respect to the State Senate redistricting plan and the State House redistricting plan, and is DENIED with respect to the United States Congressional redistricting plan; and it is

FURTHER ORDERED that all parties, including the Intervenors, shall adhere to this Court's December 20, 2001 Initial Scheduling and Pretrial Order.

IT IS SO ORDERED FOR THE COURT.

1/10/02

/s/

EMMET G. SULLIVAN
UNITED STATES DISTRICT JUDGE

Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), as provided in subsection (b).

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) based upon determinations made under the first sentence of section 4(b) are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964 . . . such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day

period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court.

Georgia Laws of 2002, Act. No 444
[Excerpts from the Temporary Senate Plan
signed into law April 11, 2002]

SECTION 1.

(a) As used in this Act, the term "special session Senate redistricting plan" means the districts for the Georgia State Senate as described in Code Section 28-2-2 of the Official Code of Georgia Annotated as amended by an Act approved August 24, 2001; Act No. 1EX6 of the first 2001 special session of the General Assembly of Georgia; Georgia Laws 2001 Extraordinary Sessions, p. 2

(b) If, as of the first day of qualifying for nomination or election to the entire Georgia State Senate in 2002 or any future year, the special session Senate redistricting plan may lawfully be implemented under the federal Voting Rights Act of 1965, as amended, pursuant to court order or otherwise, then qualifying for the Georgia State Senate in 2002 or such future year and the ensuing elections shall be conducted according to the special session Senate redistricting plan; and this Act shall not apply to such qualifying or elections or otherwise be of any further force or effect.

(c) If, as of the first day of qualifying for nomination or election to the entire Georgia State Senate in 2002 or any future year, the special session Senate redistricting plan may not lawfully be implemented under the federal Voting Rights Act of 1965, as amended, then qualifying for the Georgia State Senate in 2002 or such future year and the ensuing elections shall be conducted according to the Senate redistricting plan provided for in this Act.

(d) This Act does not repeal or amend the provisions of the special session Senate redistricting plan; and those provisions are merely suspended pending a final determination of their enforceability under the federal Voting Rights Act of 1965, as amended.

SECTION 2.

(a) Subject to the provisions of Section 1 of this Act, the senatorial districts for election of members of the Georgia State Senate shall be according to the description of senatorial districts 1 through 56 attached to this Act and made a part hereof and further identified as: Plan Name: sen02p1 Plan Type: SENATE User: Linda Administrator: S026. Each Senate district shall be composed of a portion of a county, or a county, or counties, or a combination thereof, as provided in this subsection, and shall be represented by one Senator.(b) For purposes of said attachment and description: . . . .

SECTION 3.

Subject to the provisions of Section 1 of this Act, this Act shall become effective upon its approval by the Governor or upon its becoming law without such approval and shall apply to future elections for the Georgia State Senate to the extent provided for in Section 1 of this Act.

* * * *

All Legislative Elections (1991-2001) with a Black Incumbent
Listed in Order of BVAP from Lowest to Highest

year	type	district	bvap	black	coc	special	whiteinc	blackinc	open	incwins
1996	C	2	0.35	1	1	0	0	1	0	1
2000	H	89	0.36	1	1	0	0	1	0	1
1998	C	2	0.36	1	1	0	0	1	0	1
1994	H	89	0.36	1	1	0	0	1	0	1
1996	H	89	0.36268	1	1	0	0	1	0	1
1998	H	89	0.36444	1	1	0	0	1	0	1
1996	S	25	0.36666	1	1	0	0	1	0	1
2000	C	2	0.37	1	1	0	0	1	0	1
1998	C	4	0.39	1	1	0	0	1	0	1
1998	H	173	0.4255	1	1	0	0	1	0	1
2000	H	173	0.43	1	1	0	0	1	0	1
1996	H	173	0.44356	1	1	0	0	1	0	1
2000	C	4	0.45	1	1	0	0	1	0	1
1998	H	131	0.46484	1	1	0	0	1	0	1

year	type	district	bvap	black	coc	special	whiteinc	blackinc	open	incwins
1996	H	131	0.4691	1	1	0	0	1	0	1
2000	H	131	0.47	1	1	0	0	1	0	1
1992	H	134	0.5	1	1	0	0	1	0	1
1994	H	134	0.5	1	1	0	0	1	0	1
1998	H	116	0.51742	1	1	0	0	1	0	1
2000	H	116	0.52	1	1	0	0	1	0	1
1994	C	2	0.52	1	1	0	0	1	0	1
1998	H	64	0.52348	1	1	0	0	1	0	1
1994	S	15	0.53	1	1	0	0	1	0	1
1996	H	116	0.53146	1	1	0	0	1	0	1
1994	H	136	0.54	1	1	0	0	1	0	1
1994	H	133	0.54	1	1	0	0	1	0	1
2000	S	39	0.54	1	1	0	0	1	0	1
1994	H	116	0.54	1	1	0	0	1	0	1
1992	S	26	0.55	1	1	0	0	1	0	1
1994	S	26	0.55	1	1	0	0	1	0	1

year	type	district	bvap	black	coc	special	whiteinc	blackinc	open	incwins
1998	S	39	0.5535	1	1	0	0	1	0	1
1994	H	131	0.56	1	1	0	0	1	0	1
1996	H	133	0.5606	1	1	0	0	1	0	1
1998	H	133	0.5671	1	1	0	0	1	0	1
1992	C	5	0.57	1	1	0	0	1	0	1
1994	C	5	0.57	1	1	0	0	1	0	1
1996	C	5	0.57	1	1	0	0	1	0	1
1992	H	58	0.57	1	1	0	0	1	0	1
2000	H	133	0.57	1	1	0	0	1	0	1
1994	H	58	0.57	1	1	0	0	1	0	1
1994	H	173	0.57	1	1	0	0	1	0	1
1994	S	22	0.57	1	1	0	0	1	0	1
1992	S	22	0.57	1	1	0	0	1	0	1
1998	C	5	0.58	1	1	0	0	1	0	1
1992	S	2	0.58	1	1	0	0	1	0	1
2000	H	140	0.58	1	1	0	0	1	0	1

year	type	district	bvap	black	coc	special	whiteinc	blackinc	open	incwins
2000	C	5	0.58	1	1	0	0	1	0	1
1998	H	140	0.58126	1	1	0	0	1	0	1
1996	H	140	0.58192	1	1	0	0	1	0	1
1996	S	15	0.58254	1	1	0	0	1	0	1
1996	S	26	0.58778	1	1	0	0	1	0	1
1996	S	2	0.5976	1	1	0	0	1	0	1
1998	S	15	0.59902	1	1	0	0	1	0	1
2000	S	36	0.6	1	1	0	0	1	0	1
1992	H	149	0.6	1	1	0	0	1	0	1
2000	S	2	0.6	1	1	0	0	1	0	1
1994	H	149	0.6	1	1	0	0	1	0	1
1994	C	11	0.6	1	1	0	0	1	0	1
1998	S	2	0.6003	1	1	0	0	1	0	1
1996	S	22	0.60342	1	1	0	0	1	0	1
1998	S	26	0.60554	1	1	0	0	1	0	1
1998	S	36	0.60772	1	1	0	0	1	0	1

year	type	district	bvap	black	coc	special	whiteinc	blackinc	open	incwins
1994	H	118	0.61	1	1	0	0	1	0	1
1994	H	161	0.61	1	1	0	0	1	0	1
1992	H	118	0.61	1	1	0	0	1	0	1
1994	H	71	0.61	1	1	0	0	1	0	1
1994	H	117	0.61	1	1	0	0	1	0	1
1992	H	117	0.61	1	1	0	0	1	0	1
1992	H	161	0.61	1	1	0	0	1	0	1
2000	H	64	0.61	1	1	0	0	1	0	1
2000	S	15	0.61	1	1	0	0	1	0	1
1998	S	22	0.61378	1	1	0	0	1	0	1
1996	H	134	0.6141	1	1	0	0	1	0	1
1996	S	36	0.61584	1	1	0	0	1	0	1
2000	S	26	0.62	1	1	0	0	1	0	1
2000	H	149	0.62	1	1	0	0	1	0	1
1992	H	127	0.62	1	1	0	0	1	0	1
1994	H	127	0.62	1	1	0	0	1	0	1

year	type	district	bvap	black	coc	special	whiteinc	blackinc	open	incwins
1992	S	39	0.62	0	0	0	0	1	0	0
1994	H	70	0.63	1	1	0	0	1	0	1
2000	S	22	0.63	1	1	0	0	1	0	1
1992	H	124	0.63	1	1	0	0	1	0	1
1992	H	70	0.63	1	1	0	0	1	0	1
2000	H	48	0.63	1	1	0	0	1	0	1
1992	H	148	0.63	1	1	0	0	1	0	1
1994	H	124	0.63	1	1	0	0	1	0	1
1998	H	149	0.63606	1	1	0	0	1	0	1
1994	S	10	0.64	1	1	0	0	1	0	1
1994	S	36	0.64	1	1	0	0	1	0	1
1992	S	36	0.64	1	1	0	0	1	0	1
1994	H	140	0.64	1	1	0	0	1	0	1
1996	H	58	0.64128	1	1	0	0	1	0	1
1998	H	161	0.64158	1	1	0	0	1	0	1
1996	H	148	0.64316	1	1	0	0	1	0	1

year	type	district	bvap	black	coc	special	whiteinc	blackinc	open	incwins
1996	H	136	0.64442	1	1	0	0	1	0	1
1996	H	149	0.64562	1	1	0	0	1	0	1
1998	H	134	0.6471	1	1	0	0	1	0	1
2000	H	161	0.65	1	1	0	0	1	0	1
1994	H	162	0.65	1	1	0	0	1	0	1
1998	H	136	0.65986	1	1	0	0	1	0	1
1998	H	148	0.65988	1	1	0	0	1	0	1
1992	S	35	0.66	1	1	0	0	1	0	1
1998	H	48	0.66068	1	1	0	0	1	0	1
1998	H	58	0.66386	1	1	0	0	1	0	1
1996	H	124	0.669	1	1	0	0	1	0	1
2000	H	136	0.67	1	1	0	0	1	0	1
1998	H	55	0.67286	1	1	0	0	1	0	1
1998	H	162	0.67602	1	1	0	0	1	0	1
1996	H	117	0.67818	1	1	0	0	1	0	1
1996	H	48	0.67964	1	1	0	0	1	0	1

year	type	district	bvap	black	coc	special	whiteinc	blackinc	open	incwins
2000	H	134	0.68	1	1	0	0	1	0	1
2000	H	148	0.68	1	1	0	0	1	0	1
1996	H	162	0.68238	1	1	0	0	1	0	1
1998	H	124	0.6838	1	1	0	0	1	0	1
2000	H	58	0.69	1	1	0	0	1	0	1
1996	H	55	0.69544	1	1	0	0	1	0	1
1996	H	118	0.69686	1	1	0	0	1	0	1
1996	H	127	0.69918	1	1	0	0	1	0	1
2000	H	57	0.7	1	1	0	0	1	0	1
2000	H	162	0.7	1	1	0	0	1	0	1
2000	H	55	0.7	1	1	0	0	1	0	1
2000	H	124	0.7	1	1	0	0	1	0	1
2000	S	10	0.7	1	1	0	0	1	0	1
1998	H	57	0.701	1	1	0	0	1	0	1
1998	S	10	0.70312	1	1	0	0	1	0	1
1996	S	10	0.70364	1	1	0	0	1	0	1

year	type	district	bvap	black	coc	special	whiteinc	blackinc	open	incwins
1996	S	35	0.7086	1	1	0	0	1	0	1
2000	S	55	0.71	1	1	0	0	1	0	1
1998	H	117	0.71226	1	1	0	0	1	0	1
1998	H	118	0.71494	1	1	0	0	1	0	1
1994	H	54	0.72	1	1	0	0	1	0	1
1992	H	54	0.72	1	1	0	0	1	0	1
1998	H	127	0.72414	1	1	0	0	1	0	1
1996	H	57	0.72684	1	1	0	0	1	0	1
2000	H	118	0.73	1	1	0	0	1	0	1
1994	H	69	0.73	1	1	0	0	1	0	1
2000	H	117	0.73	1	1	0	0	1	0	1
1998	S	35	0.7323	1	1	0	0	1	0	1
1996	H	69	0.74536	1	1	0	0	1	0	1
1992	H	48	0.75	1	1	0	0	1	0	1
2000	H	127	0.75	1	1	0	0	1	0	1
2000	H	50	0.75	1	1	0	0	1	0	1

year	type	district	bvap	black	coc	special	whiteinc	blackinc	open	incwins
2000	S	35	0.75	1	1	0	0	1	0	1
1994	H	48	0.75	1	1	0	0	1	0	1
1998	H	69	0.75218	1	1	0	0	1	0	1
1998	H	50	0.75442	1	1	0	0	1	0	1
1996	H	50	0.75814	1	1	0	0	1	0	1
1996	H	70	0.75938	1	1	0	0	1	0	1
2000	H	69	0.76	1	1	0	0	1	0	1
1992	H	57	0.76	1	1	0	0	1	0	1
2000	S	38	0.76	1	1	0	0	1	0	1
1992	H	52	0.76	1	1	0	0	1	0	1
1994	H	52	0.76	1	1	0	0	1	0	1
1994	H	57	0.76	1	1	0	0	1	0	1
1992	H	50	0.77	1	1	0	0	1	0	1
1994	H	50	0.77	1	1	0	0	1	0	1
1994	S	38	0.77	1	1	0	0	1	0	1
1992	S	38	0.77	1	1	0	0	1	0	1

year	type	district	bvap	black	coc	special	whiteinc	blackinc	open	incwins
1996	S	38	0.77242	1	1	0	0	1	0	1
2000	H	51	0.78	1	1	0	0	1	0	1
1996	S	43	0.78442	1	1	0	0	1	0	1
1998	H	51	0.7873	1	1	0	0	1	0	1
2000	H	49	0.79	1	1	0	0	1	0	1
2000	H	68	0.79	1	1	0	0	1	0	1
1996	H	71	0.793	1	1	0	0	1	0	1
1996	H	51	0.7937	1	1	0	0	1	0	1
1998	H	49	0.7948	1	1	0	0	1	0	1
1996	H	52	0.79482	1	1	0	0	1	0	1
1996	H	49	0.7999	1	1	0	0	1	0	1
1998	H	70	0.80284	1	1	0	0	1	0	1
1998	H	52	0.80912	1	1	0	0	1	0	1
1998	H	68	0.81046	1	1	0	0	1	0	1
1994	H	49	0.82	1	1	0	0	1	0	1
2000	H	52	0.82	1	1	0	0	1	0	1

year	type	district	bvap	black	coc	special	whiteinc	blackinc	open	incwins
1992	H	73	0.82	1	1	0	0	1	0	1
1994	H	73	0.82	1	1	0	0	1	0	1
1996	H	68	0.83122	1	1	0	0	1	0	1
1998	S	43	0.83416	1	1	0	0	1	0	1
2000	H	70	0.84	1	1	0	0	1	0	1
1996	H	54	0.84926	1	1	0	0	1	0	1
1998	H	71	0.8526	1	1	0	0	1	0	1
1992	H	53	0.87	1	1	0	0	1	0	1
1994	H	53	0.87	1	1	0	0	1	0	1
2000	S	43	0.88	1	1	0	0	1	0	1
1996	H	73	0.8838	1	1	0	0	1	0	1
1994	H	51	0.89	1	1	0	0	1	0	1
1992	H	51	0.89	1	1	0	0	1	0	1
1994	H	68	0.89	1	1	0	0	1	0	1
1994	H	72	0.89	1	1	0	0	1	0	1
1996	H	53	0.89862	1	1	0	0	1	0	1

year	type	district	bvap	black	coc	special	whiteinc	blackinc	open	incwins
1998	H	72	0.90456	1	1	0	0	1	0	1
1998	H	73	0.9065	1	1	0	0	1	0	1
2000	H	71	0.91	1	1	0	0	1	0	1
2000	H	72	0.91	1	1	0	0	1	0	1
1998	H	53	0.91132	1	1	0	0	1	0	1
2000	H	53	0.92	1	1	0	0	1	0	1
1998	H	54	0.92816	1	1	0	0	1	0	1
2000	H	54	0.93	1	1	0	0	1	0	1
2000	H	73	0.93	1	1	0	0	1	0	1

*Excerpted from Complete Legislation Election Database of 1991-2001
{P.Ex.25, App.2; PPFF Attach 1}

Open Seat Legislative Elections (1991-2001) in Districts Where BVAP was Greater than 30%
Listed in Order of BVAP from Highest to Lowest

year	type	district	bvap	black	coc	special	whiteinc	blackinc	open	incwins
1996	H	72	0.90052	1	1	0	0	0	1	0
1992	H	72	0.89	1	1	0	0	0	1	0
1992	H	68	0.89	1	1	0	0	0	1	0
1992	H	49	0.82	1	1	0	0	0	1	0
1997	H	70	0.78	1	1	1	0	0	1	0
1998	S	38	0.76746	1	1	0	0	0	1	0
1999	H	127	0.73	1	1	1	0	0	1	0
1992	H	69	0.73	1	1	0	0	0	1	0
1994	H	55	0.68	1	1	0	0	0	1	0
1994	S	35	0.66	1	1	0	0	0	1	0
1998	S	55	0.65582	1	1	0	0	0	1	0
1992	H	162	0.65	1	1	0	0	0	1	0

year	type	district	bvap	black	coc	special	whiteinc	blackinc	open	incwins
1992	H	140	0.64	1	1	0	0	0	1	0
1992	S	10	0.64	1	1	0	0	0	1	0
1994	H	148	0.63	1	1	0	0	0	1	0
1996	H	161	0.6299	1	1	0	0	0	1	0
1995	H	117	0.61	1	1	1	0	0	1	0
1992	H	71	0.61	1	1	0	0	0	1	0
1992	S	43	0.61	1	1	0	0	0	1	0
1994	S	43	0.61	1	1	0	0	0	1	0
1992	C	11	0.6	1	1	0	0	0	1	0
1999	S	2	0.6	1	1	1	0	0	1	0
1994	S	2	0.58	1	1	0	0	0	1	0
1992	H	173	0.57	1	1	0	0	0	1	0
1996	S	39	0.5634	1	1	0	0	0	1	0
1992	H	131	0.56	1	1	0	0	0	1	0
1992	H	133	0.54	1	1	0	0	0	1	0
1992	H	93	0.54	0	1	0	0	0	1	0

year	type	district	bvap	black	coc	special	whiteinc	blackinc	open	incwins
1992	H	116	0.54	1	1	0	0	0	1	0
1995	H	116	0.54	1	1	1	0	0	1	0
1998	S	12	0.535	0	0	0	0	0	1	0
1991	S	26	0.53	1	1	1	0	0	1	0
1992	S	15	0.53	1	1	0	0	0	1	0
1996	H	120	0.5228	0	-99	0	0	0	1	0
1992	H	111	0.5	0	0	0	0	0	1	0
1992	H	66	0.49	0	0	0	0	0	1	0
1998	S	25	0.36288	0	0	0	0	0	1	0
1992	H	89	0.36	1	1	0	0	0	1	0
1996	H	160	0.33368	0	0	0	0	0	1	0
1996	H	160	0.33368	0	0	1	0	0	1	0
1996	C	4	0.33	1	1	0	0	0	1	0
1992	S	29	0.33	0	0	0	0	0	1	0
1998	S	29	0.3255	0	0	0	0	0	1	0

year	type	district	bvap	black	coc	special	whiteinc	blackinc	open	incwins
1992	H	112	0.31	0	0	0	1	0	0	1
1994	H	172	0.31	0	0	0	0	0	1	0

*Excerpted from Complete Legislation Election Database of 1991-2001
{P.Ex.25, App.2; PPFF Attach 1}

Senate Elections (1991-2001) Where BVAP was Between 40.0% and 49.9% Listed Chronologically *

year	type	district	bvap	black	win cand choice	special	whiteinc	blackinc	open	incwins
1992	S	25	0.41	0	0	0	1	0	0	0
1994	S	25	0.41	1	1	0	1	0	0	0
1996	S	14	0.4059	0	0	0	1	0	0	1
1996	S	44	0.40362	0	0	0	1	0	0	1
1998	S	44	0.44786	0	0	0	1	0	0	1
1998	S	14	0.41734	0	0	0	1	0	0	1
2000	S	44	0.49	0	0	0	1	0	0	1
2000	S	14	0.41	0	0	0	1	0	0	1

*Excerpted from Complete Legislative Election Database of 1991-2001
{P.Ex.25, App.2 PPFF Attach 1}

Supreme Court, U.S.
FILED
JUL 31 2002
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No. 02-182

IN THE

Supreme Court of the United States

THE STATE OF GEORGIA,
Appellant,

v.

JOHN ASHCROFT, *et al.*,
Appellees,

and

PATRICK L. JONES, *et al.*
Intervenors.

On Appeal from the United States District Court
District of Columbia

SUPPLEMENTAL APPENDIX TO JURISDICTIONAL STATEMENT

THURBERT E. BAKER
Attorney General of the State of Georgia

DENNIS R. DUNN
Deputy Attorney General

MARK H. COHEN
Troutman Sanders LLP

THOMAS SAMPSON, SR.
Thomas, Kennedy, Sampson & Patterson

* Counsel of Record

DAVID F. WALBERT *
PARKS, CHESIN, WALBERT & MILLER, P.C.
26th Floor, 75 Fourteenth Street
Atlanta, Georgia 30309
(404) 873-8000

Counsel for Appellant

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

[Filed June 4, 2002]

Case No. 01: CV-2111 (EGS HTE LFO)

THE STATE OF GEORGIA,
Plaintiff,

v.

JOHN ASHCROFT, in his Official Capacity as Attorney General of the United States; RALPH F. BOYD, JR., in his Official Capacity as Assistant Attorney General, Civil Rights division; and the UNITED STATES OF AMERICA,
Defendants.

THE STATE OF GEORGIA'S NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the State of Georgia, Plaintiff in the above-captioned case, hereby appeals to the Supreme Court of the United States from the judgment of April 5, 2002, as amended by the orders and judgments of April 9, 2002, and June 3, 2002. Plaintiff further appeals from the judgment and order of April 5, 2002, which, *inter alia*, denied Plaintiff's request to enter a declaratory judgment that Act No. 1EX6, 2001 Extraordinary Session, does not have the purpose or effect of denying or abridging the right to vote on account of race or color.

This appeal is taken pursuant to 28 U.S.C. § 1253, 42 U.S.C. § 1973c, and other applicable laws and rules.

This 4th day of June, 2002.

Respectfully submitted,

THURBERT E. BAKER
Attorney General of the
State of Georgia
Georgia Bar No. 033887

/s/ Dennis R. Dunn
DENNIS R. DUNN
Deputy Attorney General
Georgia Bar No. 234098

/s/ Mark H. Cohen
MARK H. COHEN
Special Assistant
Attorney General
Georgia Bar No. 174567

/s/ David F. Walbert
DAVID F. WALBERT
Special Assistant
Attorney General
Georgia Bar No. 730450

/s/ Thomas Sampson, Sr.
THOMAS SAMPSON, SR.
Special Assistant
Attorney General
Georgia Bar No. 623600

/s/ Stuart F. Pierson
STUART F. PIERSON
Special Assistant
Attorney General
D.C. Bar No. 56820

Attorneys for Plaintiff

State Law Department
132 State Judicial Building
40 Capitol Square, S.W.
Atlanta, GA 30334-1300
(404) 656-7298

Troutman Sanders LLP
5200 Bank of America Plaza
600 Peachtree Street, N.E.
Atlanta, GA 30308-2216
(404) 885-3597

Parks, Chesin, Walbert
& Miller, P.C.
26th Floor,
75 Fourteenth Street
Atlanta, GA 30309
(404) 873-8000

Thomas, Kennedy, Sampson,
& Patterson
3355 Main Street
Atlanta, GA 30337
(404) 688-4503

Troutman Sanders LLP
401 9th Street, N.W.
Suite 1000
Washington, D.C. 20004-2134
(202) 274-2897

CERTIFICATE OF SERVICE

This is to certify that I have this day served or caused to be served a copy of the within and foregoing The State of Georgia's Notice of Appeal to the Supreme Court of the United States by having hand delivered a copy of same to the following:

David J. Becker, Esq.
United States Department of Justice
Civil rights Division
1800 G Street
Room 7274
Washington, D.C. 20006

Lee T. Ellis, Esq.
E. Mark Braden, Esq.
Baker & Hostetler
Washington Square, Suite 1100
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5304

Frank B. Strickland, Esq.
Anne W. Lewis, Esq.
Strickland Brockington Lewis LLP
Midtown Proscenium, Suite 1200
1170 Peachtree Street, N.E.
Atlanta, GA 30309

This 4th day of June, 2002,

/s/ Stuart F. Pierson
STUART F. PIERSON

No. 02-0182

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In The
Supreme Court of the United States

THE STATE OF GEORGIA,

Appellant,

v.

JOHN ASHCROFT, et al.,

Appellees,

and

PATRICK L. JONES, et al.,

Intervenor-Appellees.

On Appeal From The United States District Court For The District Of Columbia

MOTION TO DISMISS APPEAL OR, IN THE ALTERNATIVE, TO AFFIRM SUMMARILY

E. MARSHALL BRADEN*
LEE T. ELLIS, JR.
AMY M. HENSON
BAKER & HOSTETLER LLP
Suite 1100
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 327-1500

FRANK B. STRICKLAND
ANNE W. LEWIS
STRICKLAND BROCKINGTON LEWIS LLP
Suite 2000
1170 Peachtree Street, N.E.
Atlanta, GA 30309
(678) 347-2200

Attorneys for Intervenor-Appellees

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

LIST OF PARTIES

State of Georgia, Plaintiff-Appellant

John Ashcroft, in his official capacity as Attorney General of the United States, Defendant-Appellee

Ralph F. Boyd, Jr., in his official capacity as Assistant Attorney General of the United States, Defendant-Appellee

The United States of America, Defendant-Appellee

Patrick L. Jones, Defendant Intervenor-Appellee

Roielle L. Tyra, Defendant Intervenor-Appellee

Georgia W. Benton, Defendant Intervenor-Appellee

Della Steele, Defendant Intervenor-Appellee

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PURPOSE OF MOTION

Appellees Patrick Jones, Roielle Tyra, Georgia Benton and Della Steele, all intervenors in the case below ("the Jones Appellees"), move the Court to dismiss the appeal or, in the alternative, to affirm summarily. On April 5, 2002, a three-judge panel of the United States District Court for the District of Columbia ("the trial court" or "the district court") applied clearly defined legal standards pursuant to Section 5 of the Voting Rights Act of 1965 and declined to issue a declaratory judgment preclearing the 2001 Georgia State Senate redistricting plan ("the first Senate plan").[1] Appellant State of Georgia ("Appellant") now asks the Court to revisit the trial court's factual findings and apply Section 2 rather than Section 5 law to the case. The Jones Appellees respectfully suggest that, except in extreme circumstance, the appeals process should avoid revisiting factual determinations based on significant testimony and trial presentations. Furthermore, there is no authority to support displacing Section 5 law in favor of an analogy to Section 2 law. The only authentic legal issue presented is the Appellant's challenge to the trial court's decision allowing the Jones Appellees intervention in the proceedings. That decision involves neither a new nor complex issue. Minority citizens affected by changes in voting laws have long been allowed to intervene in Section 5 preclearance actions. On this ground as well, the appeal should be dismissed. In the alternative, the decision should be summarily affirmed.

INTRODUCTION

In Georgia, the legislative and executive branches are controlled by the Democratic Party and have been since

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[1] A revised Senate plan ("the second Senate plan") was subsequently precleared and is being used in the current elections.

1865. When Appellant entered the redistricting process this decade, it was clear that Appellant could either (1) preserve minority voting strength and sacrifice the political strength of the Democratic Party or (2) sacrifice minority voting strength and preserve the political power of the Democratic Party. Appellant chose the latter.

However, because Georgia redistricting is subject to Section 5 preclearance, Appellant was required to prove there had not been any "retrogression" or worsening of minority voters' opportunities to exercise their voting rights.[2] Using the traditional retrogression analysis methods of the Department of Justice and voting rights experts, Appellant could not succeed. Therefore, Appellant rejected the administrative preclearance process and sought a declaratory judgment in the United States District Court for the District of Columbia.[3] The hallmark

[2] Section 5 of the Voting Rights Act requires any covered jurisdiction to seek a declaratory judgment from the District Court for the District of Columbia or obtain administrative preclearance from the Department of Justice ("DOJ") before the jurisdiction can enforce any change to "any voting qualification or prerequisite to voting, or any standard, practice, or procedure." 42 U.S.C. § 1973c (2002). The court or the DOJ must declare in its judgment that the change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) [language minorities]." *Id.* The burden of proof before both the DOJ and the district court is on the jurisdiction seeking preclearance to show that the change has neither such a purpose nor such an effect. *See City of Richmond v. United States*, 422 U.S. 358, 362 (1975); *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 480 (1997).

[3] Appellant states that it did not seek administrative preclearance from the DOJ, purportedly because it wanted to speed up the process. This was clearly not Appellant's motivation, however. The current guidelines of the DOJ require that "if a retrogressive redistricting plan is submitted, the jurisdiction seeking preclearance of such a plan bears the burden of demonstrating that a less-retrogressive plan cannot reasonably be drawn." Guidance Concerning Redistricting and Retrogression Under Section 5 of the Voting Rights Act, 66 Fed. Reg. 5412

(Continued on following page)

of Appellant's argument before the trial court was that the first Senate plan was not retrogressive because a "point of equal opportunity" had been reached. In the point of equal opportunity analysis proposed by Appellant, the focus is not upon whether the minority community's opportunity to elect candidates of their choice is diminished in a districting plan, but upon whether the minority community has an opportunity "equal" to the non-minority community to elect candidates of their choice in a particular district. Such an analysis has never been relied upon by any court in making a retrogression determination.

In addition to a single expert's testimony on the point of equal opportunity, Appellant also sought to meet its burden by offering the testimony of several incumbent minority legislators that, in their opinions, the redistricting plans did not result in retrogression. Finally, in defense of its plans, Appellant argued that the dispersal of minority voters was required in order for Appellant to comply with the principle of one person, one vote.

With regard to the first Senate plan, the trial court correctly found that Appellant failed to meet its burden under Section 5. The trial court rejected Appellant's expert's "point of equal opportunity" analysis as being irrelevant to a Section 5 inquiry. Instead, applying the well-settled retrogression analysis taken straight from 42 U.S.C. § 1973c, the trial court correctly decided that

(Jan. 18, 2001). In general, "[a] proposed redistricting plan ... will occasion an objection by the DOJ if the plan reduces minority voting strength relative to that contained in the benchmark plan and a fairly-drawn alternative plan could ameliorate or prevent that retrogression." *Id.* Appellant realized that, pursuant to these rules, its plans would not be precleared by the DOJ as alternative plans had been introduced in the legislature which did not reduce the number of majority-minority districts. Accordingly, Appellant sought preclearance in the district court in an attempt to circumvent the traditional legal standards embodied in the DOJ's rules.

Appellant had failed to prove that, when judged from the benchmark, the first Senate plan would not have the effect of denying or abridging voting rights on the basis of race. The trial court concluded that the evidence produced by Appellant simply did not allow for a "competent comparison of the benchmark Senate plan and the proposed plan and their consequences for the voting strength of Georgia's African-American population." (J.S. 142a-143a).[4] The trial court's rejection of Appellant's alternate theory, the court's application of the standard retrogression test and its finding that Appellant failed to produce evidence sufficient to meet that test are all correct. Lastly, the trial court correctly concluded that "the State . . . was not forced to choose between complying with the Equal Protections Clause and the Voting Rights Act." (J.S. 125a). Therefore, the trial court's decision to deny a declaratory judgment preclearing the first Senate plan is correct.

Likewise, the law supports the trial court's decision to allow the intervention of the Jones Appellees. Appellant cites no applicable authority for its incredulous contention that minority voters have no place in a Section 5 case, the entire focus of which is the rights of those voters. To the contrary, intervention by minority voters in Section 5 cases is permitted in accordance with the trial court's discretion. In *City of Richmond v. United States*, 422 U.S. 358 (1975), the trial court allowed intervention in a Section 5 case; when the case reached this Court, it was remanded specifically for a trial on the intervenors' objections. Certainly, if the intervenors lacked standing, they would not have been entitled to such a remand.

Furthermore, when a redistricting plan is submitted to the Department of Justice for preclearance, any interested citizens or organizations may file comments and

[4] All citations to "J.S." refer to the Jurisdictional Statement submitted by Appellant.

make their positions known to the ultimate decisionmaker, the Department of Justice. Appellant's suggestion that citizens are prohibited from participating in a declaratory judgment action for preclearance would result in an anomaly. Covered jurisdictions could shut interested parties completely out of the process simply by electing to seek preclearance in the District Court.

Finally, Appellant's argument that citizens should be kept out of a Section 5 declaratory judgment action because they may delay settlement of the case is misguided. As a practical matter, there could not have been any "settlement" of this redistricting case. The plans were enacted by the General Assembly and could only be changed by majority vote of that body followed by the Governor's approval. Only a lawfully enacted plan can be precleared. Furthermore, as a legal matter, when a covered jurisdiction seeks a declaratory judgment that its redistricting plans comply with Section 5, the trial court must determine, as it did here, that the burden of proof has been met by the submitting jurisdiction. The parties cannot "settle" that the burden has been met; the court must enter its judgment that the burden has been met.

Appellant contends that even if minority citizens are allowed to participate in Section 5 cases, they may do so only if they are residents of particular districts. Appellant cites no authority for that position but instead attempts to support its argument by analogy. Specifically, Appellant relies upon cases decided under Section 2 of the Voting Rights Act and under the Equal Protection Clause but, in so doing, ignores the key difference between those cases and a Section 5 case. In redistricting claims based on Section 2 and the Equal Protection Clause, a citizen's rights as a resident of a particular district are at issue, and it is thus logical that parties must live in the affected district to have standing. However, as recognized by the trial court, this Section 5 case involves statewide plans:

> [W]e reject the State's argument that this Court's review is limited only to those districts challenged

> by the United States, and should not encompass the redistricting plans in their entirety. In a declaratory judgment action brought pursuant to Section 5, the court's review necessarily extends to the entire proposed plan. Refusing to preclear only the specific districts to which defendants object would nevertheless require the State to rework its entire Senate plan. Moreover, Georgia has presented no legal authority that would limit the Section 5 inquiry to those districts challenged by the Attorney General as retrogressive.

(J.S. 105a-106a).

In summary, there is no prohibition against intervention by citizens in Section 5 cases, as shown by this Court's decision in *City of Richmond v. United States*, 422 U.S. 358 (1975). The trial court's decision to allow the intervention of the Jones Appellees was a matter within its discretion, and Appellant's appeal should be summarily dismissed. In the alternative, the decision appealed should be affirmed summarily.

STATEMENT OF FACTS

In October 2001, for the first time since the passage of the Voting Rights Act, the State of Georgia decided to seek preclearance of its newly-passed statewide redistricting plans for state Senate, state House of Representatives and federal Congressional districts through an action for declaratory judgment rather than administratively. The trial court then "set a demanding briefing schedule, while permitting the parties to engage in extensive discovery up until the commencement of trial." (J.S. 27a). Discovery was conducted until the literal eve of trial, with the parties taking the depositions of over thirty-five lay witnesses and four expert witnesses and exchanging thousands of pages of documents. At Appellant's suggestion, much of the evidence was submitted in written form to the district court prior to trial. (J.S. 29a). During the four-day trial, three experts testified and were cross-examined at length, the sworn

statements and/or depositions of over thirty witnesses were submitted, and thousands of pages of exhibits were tendered. The district court's Order, numbering over two hundred pages, shows a comprehensive consideration of the voluminous record, particularly the evidence submitted in connection with the first Senate plan.

The district court's subsequent conclusion that Appellant had failed to meet its burden of proof as to the first Senate plan was simply unavoidable. The reduction in the minority voting power in the plan was drastic. While the benchmark plan had thirteen districts with minority population ("BPOP") above 50%, the first Senate plan contained only twelve such districts. The decrease in the black voting age population ("BVAP") in the Senate plan was even more significant. In the benchmark, twelve districts had a BVAP of more than 54%; the first Senate plan contained only *seven* such districts. Of the remaining six, all had less than a 52% BVAP. In eight of the twelve districts, the BVAP decreased by more than 10%. (Pl. Ex. 1A; DI Ex. 2; DI Ex. 32).

Although the benchmark Senate plan contained thirteen districts in which the minority voter registration ("BREG") was 52% or above, the first Senate plan contained only seven such districts; of the remaining six districts, the BREG in five of the districts (Districts 2, 12, 22, 26 and 34) decreased to less than 50%, and in the sixth (District 15) the BREG was barely 50%. (Pl. Ex. 1A; DI Ex. 2; DI Ex. 32). Although Appellant claimed, and claims still, that many of the reductions in minority population were required in order to comply with the constitutional mandate of one person, one vote, that justification was rejected by the trial court because it was simply not borne out by the facts. (J.S. 123a). With the exception of Senate District 43, *every one* of the majority-minority districts in the benchmark Senate plan was *already* underpopulated. (Pl. Ex. 1A). Even so, minority population was removed from these districts and put into other districts. For example, Appellees Benton and Steele, who were in underpopulated

Senate District 2 in the benchmark plan, were moved to the overpopulated Senate District 4 in the first Senate plan. Overall, the BVAP in this already underpopulated district was reduced by more than 10%. (Pl. Ex. 1A; DI Ex. 2; DI Ex. 32).

Similarly, unnecessary BVAP reductions were made in the House and Congressional plans. Because the General Assembly converted the House plan from 180 single member districts to a plan containing both multi-member and single member districts, it is difficult to assess the precise decreases in minority voting strength. However, it is clear that the House plan contains seven districts in which BVAP was reduced, despite the fact that the districts were already underpopulated. (J.S. 57a-71a). In the benchmark Congressional plan, the BVAP in the majority-minority Fifth District was reduced by more than 5%, even though the district lost population over the decade. (J.S. 47a-54a).

Because the entire State of Georgia is a covered jurisdiction under Section 5, the new redistricting plans could not be implemented until the State received preclearance either by declaratory judgment from the District Court for the District of Columbia or by administrative determination of the Department of Justice that the proposed changes had neither the purpose nor effect of denying or abridging minority citizens' voting rights. 42 U.S.C. § 1973c; 28 C.F.R. § 51. Appellant elected the very unusual route of pursuing Section 5 preclearance of all three plans by filing a declaratory judgment action in the district court.

Shortly after Appellant filed its complaint, the Jones Appellees, all African-American voters in the State of Georgia, moved to intervene as Defendants, contending that the proposed Congressional, state House and state Senate plans "retrogressed" or worsened minority voters' opportunities to elect candidates of choice. The trial court initially denied the motion to intervene without prejudice, pending Appellee United States' announcement of its

position on the plans and a resulting determination of whether Appellee United States would adequately represent the interests of the Jones Appellees. The trial court, however, invited the Jones Appellees to renew their Motion after the position of the United States became known.

Subsequently, Appellee United States announced that it did contend that the proposed Senate plan violated the Voting Rights Act; that it did not contend that the proposed Congressional plan violated the Voting Rights Act; and that it was not prepared to state its final position on whether the proposed House plan violated the Voting Rights Act. Based on Appellee United States' position, the Jones Appellees renewed their motion to intervene. On January 10, 2002, the trial court partially vacated its previous Order denying intervention and allowed the Jones Appellees to intervene as to the state legislative plans. (J.S. 216a-219a). After Appellee United States announced that it did not oppose preclearance of the state House plan, Appellant moved the trial court to reconsider and vacate its January 10, 2002 Order allowing partial intervention. The trial court took further briefs, heard oral argument, took still more briefs and concluded, in a January 29, 2002 Order, that intervention would be allowed not only on the state legislative plans but on the Congressional plan as well. (J.S. 214a). The trial court made it clear, however, that the intervention of the Jones Appellees would not be permitted to cause a delay in the litigation (J.S. 219a). Therefore, Appellant's contention that the Jones Appellees' intervention somehow caused a delay is factually incorrect; all pretrial proceedings and the trial took place as scheduled unless all parties consented to a schedule change and the trial court approved the same.

The court conducted a four-day trial, hearing live testimony from three experts,[5] Dr. David Epstein, Dr.

[5] The fourth expert, Dr. Roderick Harrison, did not testify at trial.

Richard Engstrom and Dr. Jonathan Katz, all political scientists. The remaining evidence was submitted in writing, in the form of sworn statements, designated deposition testimony and exhibits. (J.S. 29a). In attempting to meet its burden of proving that the new plans did not result in retrogression, Appellant relied primarily upon the testimony of its expert, Dr. Epstein. Dr. Epstein relied on a single methodology, the probit analysis. While Appellant describes the probit analysis as "a standard probability methodology," it was undisputed that the probit methodology is not a standard methodology used in assessing retrogression.[6] (J.S. 90a). Appellant's suggestion that the Jones Appellees' expert, Dr. Katz, previously used the probit analysis in the same manner as Dr. Epstein is a mischaracterization of Dr. Katz's testimony. Dr. Epstein used the probit analysis as the sole basis for his retrogression analysis; Dr. Katz clearly testified that he had utilized the methodology only in conjunction with other analyses. (2/17/02 Tr., pp. 99-100, 107).

Other than Dr. Epstein's testimony, the only other evidence offered by Appellant to meet its burden was the testimony of several minority legislators and Appellant's cross-examination of Appellees' expert and lay witnesses. With the testimony of minority legislators, Appellant attempted to show that the plans did not reduce minority voting rights because the majority of minority legislators voted for the plans. Through the cross-examination of Appellees' witnesses, Appellant attempted to prove that because some of the citizen witnesses acknowledged a possibility that a minority community's candidate of choice could still win in a district with a reduced BVAP or BREG, such testimony constituted evidence that no retrogression would occur.

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[6] The "probit" methodology is not found in a single reported Voting Rights Act decision.

After receiving post-trial briefs, findings of fact and conclusions of law, and hearing closing argument, the trial court entered an Order on April 5, 2002. In that Order, the trial court granted preclearance to Appellant's state House and Congressional plans but denied the same for the first Senate plan. The court concluded that Appellant had simply failed to meet its burden of proof. The trial court found that Appellant's expert "made no attempt to address the central issue before the court: whether the State's proposal is retrogressive," and later in the opinion deemed the expert's testimony on this point "woefully inadequate." (J.S. 121a, 143a). In fact, the trial court held that Dr. Epstein's testimony was relevant only "insofar as it suggests that decreases in BVAP within the ranges proposed in the contested Senate districts may have a significant (if inadequately quantified) negative impact on the likelihood that African American voters will be able to elect their candidates of their choice." (J.S. 123a). Of course, such would tend to disprove Appellant's contentions completely.

In rejecting Dr. Epstein's analysis, the trial court noted six major flaws. First, the court found that Dr. Epstein's analysis, while perhaps having some relevance to a Section 2 case, was not "in any way dispositive of a Section 5 inquiry." (J.S. 119a-120a). While a Section 2 case might involve the concept of an equal opportunity, Section 5 focuses upon maintenance of the status quo, which the point of equal opportunity fails to address.

Second, the trial court determined that Dr. Epstein's application of his retrogression analysis "rendered his analysis all but irrelevant." (J.S. 121a). By simply comparing the number of majority-minority districts, using the "point of equal opportunity number" (> 44.3% BVAP) and identifying the number of majority-minority districts using that figure, Dr. Epstein failed to establish any fact relevant to retrogression.

Third, Dr. Epstein neither identified the decreases in BVAP under the proposed plan nor the corresponding

reductions in the ability of minority voters to elect candidates of choice. (J.S. 121a).

Fourth, although the proposed plan contained six districts (of 13) in which the BVAP was 50.3-51.5%, Dr. Epstein did not consider the effect of reducing BVAPs to these bare majorities. (J.S. 97a).

Fifth, while the trial court found that the record showed that "African American candidates of choice running for State Senate seats are unlikely to receive the same levels of white crossover voting as may occur in statewide elections," Dr. Epstein's analysis of white crossover voting was based *entirely* on data from three statewide general elections. (J.S. 91a, 144a). In fact, Dr. Epstein testified that "the whole point of my analysis is not to look at polarization per se" and that "the great advantage of the probit analysis" is that he did not have to consider, among other things, crossover voting. (J.S. 127a & n.39).

In a similar vein, the sixth and final flaw was that the lack of information in Dr. Epstein's report rendered it useless in assessing "the expected change in African American voting strength statewide that will be brought by the proposed Senate plan." (J.S. 121a).

With respect to the legislators' testimony offered by Appellant, the trial court concluded that while that evidence might have been probative of a discriminatory purpose, the court did not find a discriminatory purpose. The court concluded that the legislators' testimony, offered to show support of the plan, was not relevant to a consideration of a discriminatory effect. (J.S. 134a-135a).

Finally, the trial court concluded that although lay witnesses acknowledged a *possibility* that a minority community's candidate of choice might still win in a district with reduced BVAP or BREG, that testimony did not constitute evidence that the plan would not result in retrogression. (J.S. 139a). The trial court rejected this argument for one of the same reasons it rejected Dr. Epstein's analysis: the inquiry in a Section 5 action is not

whether there is a fair chance for minority voters to elect candidates of choice, but whether there is a lesser chance. (J.S. 139a).

Perhaps the trial court best summarized its opinion when expressing its concern that although the benchmark Senate plan included four districts with BVAPs of 55.43% to 62.45%, the first Senate plan proposed by Appellant reduced these BVAPs to "bare majorities." (J.S. 97a, 113a-114a). The court was particularly troubled when that fact was combined with the fact that in five districts the BREG ranged from 52.48% to 64.07% in the benchmark plan but was reduced to 47.46% to 49.44% in the first Senate plan.[7] The court noted that Appellant produced no evidence, by way of expert testimony or otherwise, to show that these decreases in BVAP and BREG would be counteracted by white crossover voting or an increase in minority voting strength in other districts. Because such evidence was not produced, the trial court concluded that Appellant failed to show that the first Senate plan did not have the effect of denying or abridging minority citizens' voting power. Therefore, Appellant was not entitled to preclearance of the Senate plan.

With respect to the intervention of the Jones Appellees, the record establishes that the district court considered the issue thoroughly on several different occasions.

Curiously, Appellant's argument on appeal that intervention is never proper in a Section 5 action completely contradicts Appellant's argument before the district court that Federal Rule of Civil Procedure 24 was applicable but precluded intervention because the Attorney General could adequately represent intervenors' interests.

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[7] The trial court apparently did not consider District 34 in the range, believing it was a newly created district. However, District 34 is not a newly created majority-minority district. It is simply the former District 44 by another name. (DI Ex. 32).

In any event, the district court correctly permitted intervention because intervenors established each of the requirements of Rule 24(a)(2): (1) timely filing before counsel for defendant had entered an appearance, discovery commenced, or a three-judge panel appointed; (2) an interest in the subject matter of the litigation as minority citizens of Georgia; (3) interests which would have been impaired had intervenors not been able to present those interests; and (4) the minimal showing required to demonstrate that their interests would not be adequately represented by the Attorney General.

I. THE DISTRICT COURT'S RULING DID NOT REQUIRE APPELLANT TO DRAW "SAFE" MAJORITY-MINORITY DISTRICTS WITH "SUPERMAJORITY" MINORITY POPULATIONS

In its first argument, Appellant completely mischaracterizes the trial court's ruling as requiring Appellant to draw "safe" majority-minority districts with "supermajority" minority populations. It is clear, both from the trial court's April 5, 2002 Order and June 3, 2002 Order ultimately approving a revised Senate plan, that the district court imposed no such requirement upon Appellant. (J.S. 1a-150a). Instead, the district court merely insisted, as it was bound to do under Section 5, that Appellant prove the first Senate plan had neither the purpose nor effect of reducing the ability of minority voters to elect candidates of choice.

Appellant proposes a novel legal theory that is contrary to 30 years of practice and precedence as well as the policy considerations underlying the Section 5 preclearance requirement. Under Appellant's theory, the state could recraft representational districts that presently, without fail, elect the choice of the minority community. Under Appellant's analysis, a new district plan could reduce the majority-minority voting age population in these districts to an "equal opportunity" level, a level where Appellant's expert witness projects the minority

preferred candidate has a 50-50 chance of being elected. Pursuant to this analysis, such a new plan is not "retrogressive" of minority voting rights and should be precleared because it affords "minorities equal opportunities at success."

While the Jones Appellees agree that the test for retrogression involves an "equal opportunity" analysis, the "equal opportunity" must be for minority voters in the new plan as compared to the benchmark plan. Equal opportunities to elect between minority and non-minority voters in particular districts is not the test.

As Appellant recognizes, Section 5 was designed to "insure that [the gains thus far achieved in minority political participation] shall not be destroyed through new [discriminatory] procedures and techniques." (J.S. 18). Yet, in espousing a theory that Section 5 requires that minority communities have only an "equal" opportunity to elect candidates of choice, Appellant engages in the exact destruction of minority gains that Section 5 was intended to prohibit.

The purpose of Section 5 cannot be disputed. It is to guard against backsliding with respect to minority voting power. *See Reno v. Bossier Parish School Bd.*, 520 U.S. 471, 478 (1991); *Miller v. Johnson*, 515 U.S. 900, 926 (1995). Appellant drew the first Senate plan in a manner that clearly resulted in a loss of minority voting power, and therefore, Appellant was unable to meet the well-established burden of proof for establishing that no backsliding has occurred, *i.e.*, that the change does not have the purpose and will not have the effect of reducing the ability of minority voters to elect candidates of their choice. 42 U.S.C. § 1973c.

Appellant simply failed to meet this burden of proof. The district court described the record as voluminous but went on to identify the problem: the record did not contain evidence sufficient for Appellant to meet its burden. (J.S. 143a-145a). Rather than argue that the evidence it offered was sufficient to meet the statutory burden, Appellant

chose, and continues to choose, instead to argue for a change in the burden. (J.S. 19). Appellant's argument, that the Section 5 burden should be akin to that in a Section 2 vote dilution case, fails. The burdens are not interchangeable. The Section 5 burden is a statutory obligation, placed squarely (and only) upon jurisdictions with a history of discriminatory voting practices, to prove that a change *does not reduce* minority voting power. 42 U.S.C. § 1973c. Furthermore, the burden of proof must be met before the new practice or procedure can be used, as Section 5 is a prophylactic, rather than a remedial, measure.

By contrast, the Section 2 burden, established in *Thornburg v. Gingles*, 578 U.S. 30 (1986), requires the challenger, not a jurisdiction, to prove that a change *does* reduce minority voting strength. Because both the purposes of, and remedies for violations of, Sections 2 and 5 are distinct, so too are the burdens and the identity of the parties required to meet those burdens. Appellant cites no authority for its argument that the statutory burden of Section 5 can or should be abandoned in favor of the Section 2 burden.

The district court, in fact, considered and rejected this attempt by Appellant: "Georgia thus asks us to apply a Section 2 test to the proposed plan. . . . The State's implicit argument is that retrogression cannot exist where its proposed plan satisfies Section 2. We disagree." (J.S. 112a). In a related footnote, the district court succinctly summarized Appellant's request: "Effectively, then, the State would have us adopt the converse of the argument rejected by the Supreme Court in the *Bossier Parish* cases. There, the Court rebuffed the claim that preclearance must be *denied* where a proposed plan *violates* Section 2." (J.S. 112a n.35 (citations omitted)).

The trial court correctly declined Appellant's invitation to ignore the statutory burden of proof in Section 5 in favor of the new burden proposed by Appellant analogizing to Section 2. Despite Appellant's contention that "[t]his Court's jurisprudence, the statute itself and all of the

underlying congressional history make it clear that it is equal opportunity – not safe seats or guarantees – that is the object of the law," (J.S. 20), Appellant cites no Section 5 jurisprudence, statute or congressional history supporting the assertion.

Appellant's citations to the *City of Richmond* and *United States v. Mississippi* do not support its argument. Those cases do stand for the proposition that overrepresentation cannot be required, but a comparison of the Senate benchmark plan, the first Senate plan rejected by the district court, and the revised Senate plan precleared by the district court shows that there was no requirement of minority "overrepresentation."

Moreover, *City of Richmond* and *United States v. Mississippi* are factually distinguishable from the instant case. In *City of Richmond*, changes in the City's boundaries increased the percentage of white residents in the City, resulting in a proportional decrease in the percentage of black residents in the city. 422 U.S. 358, 368 (1975). However, unlike the *City of Richmond*, Georgia did not attempt to justify the decrease in minority voting power under the first Senate plan on geographic or demographic changes. Neither the trial court nor the Jones Appellees contend that the number or make-up of majority-minority districts may not change with demographic or geographic changes.

Similarly distinguishable on its facts, *United States v. Mississippi* involved the decrease in BVAP in three districts in which, even under the benchmark plan, black voters could not elect a candidate of choice. 490 F. Supp. 569, 580 & n.5 (D.D.C. 1979). In this case, Appellant took districts in which the minority community could elect candidates of choice and made them districts in which they could not so do.

Appellant's last-ditch effort to convince this Court that Section 2 standards should be used in this Section 5 case is in the form of an "opening the floodgates" argument. Appellant reasons that unless the Section 2 and Section 5 burdens are exactly the same, Appellant will be subjected

to Section 2 claims for "packing," and that such claims "would hardly be frivolous." (J.S. 23).

While the Jones Appellees are surprised that Appellant seems to invite a claim for Section 2 litigation, Appellant's position is not legally sound. The Senate Districts at issue, Districts 2, 12, 15, 22 and 26, at BVAPS of 50.31%, 50.66%, 50.87%, 51.51% and 50.80% respectively, can hardly be described as "packed" or "supermajority." Furthermore, the suggestion that such districts were drawn "over the *ardent* opposition of the overwhelming majority of Georgia's African-American legislators" is both factually incorrect and legally irrelevant. (J.S. 23) (emphasis added). There is no evidence in the record that minority legislators ardently opposed districts with BVAPs at the levels stated above; in fact, the record establishes that many minority legislators had grave concerns about the decreased BVAPs.[8] (J.S. 134a). As the trial court correctly pointed out, the opinion of minority legislators might be relevant to whether there was a discriminatory purpose, but those opinions were not relevant with respect to a discriminatory effect. (J.S. 135a).

In the end, Appellant simply did not produce evidence that allowed the district court to find, using the parameters of Section 5, that the first Senate plan had neither the purpose nor effect of abridging or denying the right to vote based on race. Perhaps knowing that it could not meet that burden, Appellant tried to convince the lower court that a different burden – that of Section 2 – should be

[8] Their fears and the intervenors' arguments were validated on September 10, 2002, in the Democratic run-off primary in Georgia State House District 44. The longtime African-American incumbent was defeated by a white opponent who received over 95% of the white vote. White voters made up a majority of the voters who turned out on election day. Had the district remained at its benchmark minority voting strength, the choice of a majority of the African-American community, the incumbent, would have won renomination.

used. The district court properly rejected that argument, and the Jones Appellees request this Court to do so as well.

II. THE DISTRICT COURT'S RULING, WHICH CORRECTLY APPLIED SECTION 5, DID NOT OFFEND THE CONSTITUTION AND DID NOT REQUIRE THE DRAWING OF "SUPERMAJORITY" LEGISLATIVE DISTRICTS AND "SAFE" SEATS

Appellant's second argument appears to be the same argument as the first – that Section 2 standards should be applied to a Section 5 preclearance case instead of Section 5 standards – but with the twist that the failure to use Section 2 in this case amounts to a constitutional violation. Appellant cites absolutely no authority for that proposition but instead argues that because Section 5 originally focused upon intent, the examination of the first Senate plan should have been limited to an "intent" examination under Section 5 and an "effects" examination under a Section 2 standard of "equal opportunity." (J.S. 23-24).

There are several flaws in this argument. First, as noted above, none of the districts at issue, indeed, none of Georgia's new legislative or congressional districts, can accurately be described as "supermajority" districts. Second, as Appellant correctly recognizes, Section 5 contains, as it has for the last twenty years, an equally important requirement that proposed changes not have the effect of reducing minority voting rights. (J.S. 23-24). Appellant concedes that the effect prong has been deemed constitutionally valid. (J.S. 24).

It was Appellant's failure to meet the effect prong that led to the rejection of the first Senate plan. (J.S. 144a). Contrary to Appellant's assertions, the district court never required that Appellant prove its case by demonstrating that all majority-minority seats were "safe," nor did the district court require "supermajority" districts. Appellant

argues that the trial court's opinion requires that the same or greater number of districts must be maintained as safe minority seats, and that the trial court's ruling dictates "an inexorable 'ratcheting up' process whereby Georgia loses its authority to make reasonable redistricting choices." (J.S. 25) This is simply not true. If minority population grows in a district, a district which was not a majority-minority district might become a majority-minority district, or an influence majority-minority district might become a true majority-minority district over the decade. Likewise, if the non-minority population grows in a district, as is happening in many coastal areas of Georgia as well as in some urban areas, the benchmark minority voting strength may decrease. The result is totally dependent upon the natural growth patterns that occur in that individual location. The purpose of analyzing the benchmark plan using the current census data is to prevent a jurisdiction from using redistricting as a way to suffocate a growing minority population in a discrete geographic area which has become, or is becoming, the majority population in a district. A district which was originally an influence majority-minority district, but which has grown into a majority-minority district over the decade, should not have a racial quota applied to it which requires the district to be restructured in a geographically bizarre fashion in order to retrogress its minority voting strength to a marginal level. The Senate Committee on the Judiciary recognized this when it stated in its 1982 report (recommending extending Section 5 for 25 years) that " . . . the departure from past practices as minority voting strength reaches new levels . . . serves to underline the continuing need for Section 5." S.Rep.No. 97-417, at 10.

The district court did not require the Senate districts to be "ratcheted up," (J.S. 25), but instead required those districts not to be weakened to the point that minority voting rights were reduced. It is clear from the Senate plan that was ultimately approved that the district court never imposed a requirement that the BVAPs in those

districts not be reduced. The revised Senate plan, approved by the trial court's June 3, 2002 Order, allowed preclearance of a Senate plan in which almost every majority-minority district saw a decrease in BVAP. Thus, Appellant's fear that the trial court's decision will lead to covered jurisdictions having "only supermajority, safe districts" is unfounded. The trial court did not rule that minority population could never be reduced in a district; it simply ruled, in accordance with Section 5, that minority population could not be reduced to the point at which, considering all relevant factors, minority voting power was reduced. It was Appellant's burden to prove that there was no such reduction. *See City of Richmond v. United States*, 422 U.S. 358, 362 (1975); *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 480 (1997). When Appellant failed to do so, the trial court properly denied declaratory judgment.

Appellant argues that the district court's ruling "would strip covered states like Georgia of their political choices." (J.S. 25). To the contrary, the district court made clear that it would not interfere with political choices, (J.S. 148-149a), unless those choices interfered with the Voting Rights Act, as they did here: "Whatever political success the Georgia Democratic Party may enjoy as a result of the Senate redistricting plan does not and cannot immunize the plan's racially retrogressive effects from a Section 5 attack. The Voting Rights Act was not enacted to safeguard the electoral fortunes of any particular political party." (J.S. 142a).

That ruling is in no way a constitutional violation. In fact, the only constitutional violation in the first Senate plan is entirely of Appellant's making and directly acknowledged by Appellant. Appellant made the point many times that the intent of its plans was to maximize Democratic political performance. Now, Appellant acknowledges that its own goal was constitutionally infirm: "Guaranteeing a particular political result is not a constitutionally legitimate goal." (J.S. 25).

III. THE DISTRICT COURT CORRECTLY PERMITTED INTERVENTION BY AFFECTED GEORGIA CITIZENS

A. The Court has recognized intervention by private parties in Section 5 declaratory judgment actions, and nothing in the statute or caselaw precludes intervention.

Nearly thirty years ago, the Court recognized that Federal Rule of Civil Procedure 24 permits intervention in declaratory judgment actions brought pursuant to the Voting Rights Act. *See NAACP v. New York*, 413 U.S. 345, 365 (1973). *See also Bossier Parish Sch. Bd. v. Reno*, 157 F.R.D. 133, 134 (D.D.C. 1994) (applying Rule 24 to permit intervention in Section 5 preclearance action). Since that time, the Court has noted the presence of private party intervenors in multiple Section 5 cases. *See City of Richmond v. United States*, 422 U.S. 358, 366 (1975) (noting that district court referred Section 5 action to a special master for hearings when intervenors opposed a consent judgment entered into by the City and Attorney General); *City of Lockhart v. United States*, 460 U.S. 125, 129 (1983) (noting the intervention of private party in Section 5 declaratory judgment action); *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 476 (1997) (noting the intervention of private parties in Section 5 declaratory judgment action); *United States v. Mississippi*, 444 U.S. 1050 (1980) (summarily affirming Section 5 decision in which intervention by private parties was allowed). In all of these cases the Court clearly recognized that intervention had been allowed; in none of these cases did the Court indicate that intervention was improper.

Appellant's assertion that the Court and other courts have indicated their "opposition to intervention" in Section 5 declaratory judgment actions does not stand up to examination. The first case cited by Appellant for this proposition, *Morris v. Gressette*, 432 U.S. 491 (1977), is

completely inapposite to the issue. In *Morris*, the Court was asked to determine whether a district court could review action by the Attorney General when a state elects to pursue preclearance *administratively*, rather than in a declaratory judgment action. *Id.* at 501. After specifically distinguishing between the two avenues of preclearance provided by Section 5, the Court concluded that because administrative preclearance was intended to be an "expeditious alternative to declaratory judgment actions," judicial review of the Attorney General's actions is not allowed. *Id.* at 504. This ruling provides no support for Appellant's argument that private parties cannot intervene in Section 5 *declaratory judgment* actions.

Next, Appellant contends that in *Brooks v. Georgia*, 516 U.S. 1021 (1995), the Court summarily affirmed the district court's denial of intervention. The district court decision that the court summarily affirmed, *Georgia v. Reno*, 881 F. Supp. 7 (D.D.C. 1995), however, contains absolutely no discussion of intervention. In fact, there is no indication that the Court was even aware that private persons had sought to intervene in the case below. Thus, the Court's affirmance cannot be read to indicate that the Court has reversed its long-held position permitting intervention in Section 5 cases.[9]

Appellant's contention that the Court "upheld denial of intervention in a § 4 action" in *NAACP v. New York*, 413 U.S. 345 (1973), is also misleading. In that case, the Court specifically recognized that intervention was permissible under Federal Rule of Civil Procedure 24, but determined that the district court did not abuse its discretion in finding the motion to intervene untimely – the first prong

[9] Moreover, the Court recognized the presence of intervenors in a Section 5 case decided after *Brooks* without suggesting that intervention was improper. *See Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471 (1997).

of a Rule 24 analysis. *Id.* at 367-69. As Appellant notes, *NAACP v. New York* cited *Apache County v. United States*, 256 F. Supp. 903 (D.D.C. 1966) with approval. Contrary to Appellant's representations, however, *Apache County* did not deem "intervention inappropriate because of the Attorney General's unique statutory role." (J.S. 27). Rather, *Apache County* explicitly rejected the argument made now by Appellant that "the spirit of the 1965 Act excludes intervention by private parties under any circumstances." *Apache County*, 256 F. Supp. at 907. Recognizing the affirmative role that courts are given in declaratory judgment actions bought under the Voting Rights Act, the *Apache County* court stated:

> We are being asked to enter a judgment declaring the existence of a state of facts. . . . We see no basis for supposing that Congress meant to strip the court of its customary authority to permit intervention deemed helpful by the court. In our view the court has discretionary authority to permit intervention by applicants offering to provide evidence or argument concerning the facts the court must determine in arriving at its declaratory judgment.

Id. at 908.

Finally, Appellant's argument that intervention should be precluded in Section 5 declaratory judgment actions because private parties prolong the length of trial fails for three reasons. First, had Appellant truly been concerned about possible delay and its effect on candidates and the public, Appellant could have sought administrative preclearance instead of instituting this declaratory judgment action. As the Court recognized in *Morris*, the legislative history of Section 5 indicates that the administrative preclearance option was specifically added to the Act to address timing concerns by providing a "speedy alternative method of compliance." *Morris*, 432 U.S. at 503.

Second, Appellant had the option of passing redistricting plans and initiating the preclearance process much earlier than it did. Although the census numbers were released in March 2001, Georgia's Governor did not sign the redistricting bill – and Appellant did not file the declaratory judgment action – until October 2001. (J.S. 27a).

Third, the presence of intervenors in this action did not prolong the length of the declaratory judgment proceedings. The intervenors were subject to the same schedules as the other parties.[10] And contrary to Appellant's assertion, the district court could not have entered a consent decree had the Attorney General and Appellant reached a settlement as to a particular plan. The submitting jurisdiction bears the burden of proving that a proposed change in a voting law does not have the purpose and will not have the effect of abridging or denying the right to vote on the basis of race or color. 42 U.S.C. § 1973c. *See also Reno v. Bossier Parish Sch. Bd.*, 520 U.S. at 480. If the change is submitted to the Department of Justice for preclearance, the submitting jurisdiction must prove its case to the satisfaction of the Department of Justice. However, when the case is submitted to the district court, the submitting jurisdiction must prove its case to the satisfaction of the court. There is simply no authority that the district court could have entered a declaratory judgment for Appellant, based solely on the Department of Justice's acquiescence in the proposed plan, before Appellant had proven entitlement to that judgment.

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[10] The Attorney General agreed that intervention would neither delay nor disrupt the proceeding: "The United States does not believe that intervention by the movants at this time would unduly delay or disrupt this action, so long as the movants are required to meet the same schedules as the Plaintiff and the United States." United States' Response to Motion of Patrick L. Jones and Roielle L. Tyra to Intervene as Defendants, Appendix at 8a.

Rather, the applicable law is found in *City of Richmond v. United States*, 422 U.S. 358 (1975). In that case, the City of Richmond sought preclearance of an annexation. After permissive intervention was granted to a group of minority citizens, a proposed consent decree between the City of Richmond and the United States was presented to the court. *Id.* at 366. The intervenors objected, and the trial court set the case for a hearing on the merits before a special master. *Id.* Despite the United States' willingness to enter into a consent decree, the special master's recommendation was that the trial court find that the City of Richmond had not met its burden of proof. *Id.* The trial court followed the recommendation, and the annexation plan was rejected. *Id.* The City appealed. While the Court remanded the case for additional factual findings, *id.* at 378, the case makes clear that even upon the offering of a consent decree, a submitting jurisdiction is not relieved of its burden to make the requisite showing under Section 5.

B. Intervenors had standing because they reside in districts subject to preclearance.

Pursuant to Section 5, Appellant had the burden of proving that its proposed changes in voting laws – that is, the new plans in their entirety, not particular districts – had neither the purpose nor effect of denying or abridging minority citizens' voting rights. Although Appellant attempted to make this a case about particular districts, the issue in a Section 5 case is whether an overall plan reduces minority voting strength.[11] The Jones Appellees

[11] The United States supported this view in its opposition to Appellant's motion to vacate the district court's initial order permitting intervention: "Although the Court's factual inquiry necessarily will focus upon particular areas, Section 5 preclearance must be granted or denied based upon whether the plan has a net retrogressive effect across the State. Thus, residence in any particular area or district should not be a criterion by which the Court determines standing in

(Continued on following page)

did not challenge particular districts but the plans as a whole. Indeed, the declaratory relief obtained by a party opposing Section 5 preclearance is the denial of preclearance for an entire plan, not a single district. The cases cited by Appellant, none of which are Section 5 cases, are distinguishable on this basis.

The case of *United States v. Hays*, 515 U.S. 737 (1995), involving a single district alleged to be racially-gerrymandered, does not defeat the Jones Appellees' standing in this case. The *Hays* plaintiffs' claims, in which intervenors sought to join, differed from the claims here in two important respects: the claims (1) were brought after preclearance and (2) were based on the Louisiana and federal Constitutions and Section 2 of the Voting Rights Act, not Section 5. At issue in the case at hand, in contrast, is not the harm presented by a single gerrymandered district after preclearance, but instead, the harm of an entire plan for which preclearance is sought. In short, by the time a case like *Hays* is filed, the plan has been precleared and the issue is whether the new district being attacked results in representational harms based on racial classifications. On the other hand, the harm to be avoided in a Section 5 preclearance case is the implementation of a retrogressive plan – whether the plan fails because only a particular district or the plan as a whole dilutes minority voting strength.[12]

Cases that interpret *Hays* are clear that its holding with respect to standing is particularly tailored to racial gerrymandering cases. *See Shaw v. Hunt*, 517 U.S. 899, 904 (1996) (citing *Hays* for the proposition that one who

actions of this type." United States' Opposition to Plaintiff's Motion to Vacate Order Permitting Intervention on the Senate Plan, Appendix at 13a.

[12] The one person, one vote cases cited by appellant are distinguishable on the same grounds.

resides in a racially-gerrymandered district has standing to challenge the district, while one who does not reside in the district lacks standing unless he or she has been personally subjected to racial classification); *Dillard v. Baldwin County Comm'rs*, 225 F.3d 1271, 1279 (11th Cir. 2000) (finding that *Hays* "set forth a bright-line standing rule for *a particular class of cases* alleging illegal gerrymandering with respect to voting districts") (emphasis added). In *Wilson v. Minor*, 220 F.3d 1297 (11th Cir. 2000), the Eleventh Circuit Court of Appeals, considering an attack on a county commission election scheme, explained the difference between *Hays* and cases, such as the one at hand, in which an *entire* election scheme is at issue:

> *Hays* lays down a bright-line standing rule for a particular class of cases alleging illegal racial gerrymandering with respect to voting districts: if the plaintiff lives in the racially gerrymandered district, she has standing; if she does not, she must produce specific evidence of harm other than the fact that the composition of her district might have been different were it not for the gerrymandering of the other district. There is no suggestion in *Hays* – or any subsequent decision that we are aware of – that the district-by-district analysis adopted in that decision applies to a case . . . which does not have anything to do with gerrymandering and relates instead to an allegedly illegal electoral scheme covering an *entire* election area.

220 F.3d at 1303-04, n.11 (emphasis in original).

The trial court correctly distinguished the Jones Appellees' Section 5 challenge in this action from the racial gerrymander challenge in *Hays*, holding that because intervenors challenged the redistricting plans as applied

to the state as a whole, intervenors had standing by virtue of residing in Georgia.[13] (J.S. 30a). Any other conclusion would have resulted in two inconsistencies. First, although the Jones Appellees would have been allowed to make any comment and present any evidence they wished if the proposed plans were submitted to the Department of Justice for administrative preclearance (without regard to whether the comments concerned their particular home districts), Appellant would have been able to curtail sharply the comments and evidence that the Jones Appellees could submit by seeking declaratory judgment in the district court. Second, in order to have had standing to put Appellant to its burden of proving that the proposed plans in their entirety are not retrogressive, the Jones Appellees would have needed a group of 249 individuals in order to cover the entire Senate plan (56 districts), the entire House plan (180 districts) and the entire Congressional plan (13 districts). Neither *Hays* nor any other case that the Jones Appellees have found requires that enormous burden.

In summary, Appellant has not and cannot cite any applicable authority that supports a ban on intervention in a Section 5 declaratory judgment action. On numerous occasions, the trial court considered all of Appellant's arguments on the issue and correctly rejected them. In its argument to this Court, Appellant contends that intervention should be prohibited because "[M]ore often than not, intervenors have purely political reasons for opposing

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[13] As the trial court also noted, even if individualized harm was a requirement for standing in a Section 5 action, intervenors would satisfy the requirement by virtue of the fact that the proposed plans remove them from majority-minority districts: "[T]he removal of intervenors from a majority-minority district is sufficient to provide intervenors with standing to challenge the proposed district." (J.S. 30a).

a voting change . . . ." (J.S. 28). Whether Appellant's prediction is true remains to be seen,[14] but it cannot be disputed that an attempt to silence all dissent, especially that of members of the affected group, always has a purely political motivation. A ruling that citizens, particularly minority citizens, have no right to participate in a Section 5 proceeding if the submitting jurisdiction elects to file a declaratory judgment action in lieu of an administrative proceeding would effectively silence any opposition.

CONCLUSION

For the foregoing reasons, the Jones Appellees respectfully request that the Court summarily dismiss the appeal in this case.

Respectfully submitted,

E. MARSHALL BRADEN*
LEE T. ELLIS, JR.
AMY M. HENSON
BAKER & HOSTETLER LLP
Suite 1100
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 327-1500

FRANK B. STRICKLAND
ANNE W. LEWIS
STRICKLAND BROCKINGTON LEWIS LLP
Suite 2000
1170 Peachtree Street, N.E.
Atlanta, GA 30309
(678) 347-2200

Attorneys for Intervenor-Appellees

**Counsel of Record*

[14] Certainly, Appellant's contention was not true in this case, as the Jones Appellees were two Republicans and two Democrats.

Plan Name: s2000(y2k) Plan Type: User: staff Administrator:

DISTRICT		POPULATION	DEVIATION	% DEVIATION	BLACK	% BLACK	BLACK COMBO	TOTAL BLACK	%TOTAL BLACK	HISP.OR LATINO	%HISP.
001		135,998	-10,189	-6.97%	23,811	17.51%	677	24,488	18.01%	3,430	2.52%
	VAP	102,781			15,999	15.57%	271	16,270	15.83%	2,328	2.27%
002		110,558	-35,629	-24.37%	71,704	64.86%	666	72,370	65.46%	2,353	2.13%
	VAP	81,038			48,728	60.13%	366	49,094	60.58%	1,723	2.13%
003		127,078	-19,109	-13.07%	50,375	39.64%	1,461	51,836	40.79%	7,610	5.99%
	VAP	88,494			32,569	36.80%	477	33,046	37.34%	4,902	5.54%
004		150,267	4,080	2.79%	41,883	27.87%	425	42,308	28.16%	4,525	3.01%
	VAP	111,827			29,566	26.44%	195	29,761	26.61%	3,091	2.76%
005		141,032	-5,155	-3.53%	23,531	16.68%	1,138	24,669	17.49%	19,669	13.95%
	VAP	107,639			16,312	15.15%	571	16,883	15.68%	13,927	12.94%
006		140,746	-5,441	-3.72%	21,801	15.49%	319	22,120	15.72%	5,380	3.82%
	VAP	103,992			14,782	14.21%	122	14,904	14.33%	3,438	3.31%
007		139,308	-6,879	-4.71%	32,318	23.20%	571	32,889	23.61%	4,142	2.97%
	VAP	99,970			21,467	21.47%	202	21,669	21.68%	2,608	2.61%
008		139,978	-6,209	-4.25%	46,311	33.08%	601	46,912	33.51%	3,543	2.53%
	VAP	103,139			31,102	30.16%	290	31,392	30.44%	2,398	2.33%
009		176,454	30,267	20.70%	23,980	13.59%	1,120	25,100	14.22%	12,672	7.18%
	VAP	125,004			15,517	12.41%	480	15,997	12.80%	8,365	6.69%
		114,874	-31,313	-21.42%	84,662	73.70%	962	85,624	74.54%	2,765	2.41%
	VAP	84,776			59,335	69.99%	570	59,905	70.66%	1,991	2.35%
011		131,749	-14,438	-9.88%	54,620	41.46%	401	55,021	41.76%	4,284	3.25%
	VAP	95,024			35,997	37.88%	192	36,189	38.08%	2,721	2.86%
012		120,205	-25,982	-17.77%	71,526	59.50%	454	71,980	59.88%	1,729	1.44%
	VAP	87,505			48,287	55.18%	221	48,508	55.43%	1,176	1.34%
013		137,559	-8,628	-5.90%	43,735	31.79%	359	44,094	32.05%	8,060	5.86%
	VAP	99,871			28,534	28.57%	130	28,664	28.70%	5,375	5.38%
014		126,892	-19,295	-13.20%	55,167	43.48%	367	55,534	43.76%	3,086	2.43%
	VAP	91,525			37,907	41.42%	186	38,093	41.62%	2,027	2.21%
015		106,802	-39,385	-26.94%	68,792	64.41%	1,422	70,214	65.74%	6,803	6.37%
	VAP	75,931			46,533	61.28%	580	47,113	62.05%	4,741	6.24%
016		131,708	-14,479	-9.90%	28,199	21.41%	609	28,808	21.87%	3,875	2.94%
	VAP	98,691			19,454	19.71%	255	19,709	19.97%	2,615	2.65%
017		194,813	48,626	33.26%	30,203	15.50%	726	30,929	15.88%	3,984	2.05%
	VAP	139,273			20,498	14.72%	251	20,749	14.90%	2,512	1.80%
018		139,764	-6,423	-4.39%	35,459	25.37%	706	36,165	25.88%	3,905	2.79%
	VAP	101,129			23,655	23.39%	234	23,889	23.62%	2,609	2.58%
019		126,189	-19,998	-13.68%	33,129	26.25%	319	33,448	26.51%	6,298	4.99%
	VAP	91,896			22,281	24.25%	126	22,407	24.38%	4,053	4.41%

1a
[Statistics For Plaintiff's Exhibit 1A)

DISTRICT		POPULATION	DEVIATION	% DEVIATION	BLACK	% BLACK	BLACK COMBO	TOTAL BLACK	%TOTAL BLACK	HISP.OR LATINO	%HISP.
020		122,614	-23,573	-16.13%	46,562	37.97%	306	46,868	38.22%	2,759	2.25%
	VAP	89,445			31,269	34.96%	142	31,411	35.12%	1,897	2.12%
021		141,259	-4,928	-3.37%	9,485	6.71%	607	10,092	7.14%	5,254	3.72%
	VAP	102,336			6,460	6.31%	263	6,723	6.57%	3,542	3.46%
022		108,512	-37,675	-25.77%	72,575	66.88%	1,166	73,741	67.96%	2,713	2.50%
	VAP	76,793			48,287	62.88%	488	48,775	63.51%	1,741	2.27%
023		136,107	-10,080	-6.90%	49,396	36.29%	906	50,302	36.96%	3,377	2.48%
	VAP	101,116			33,432	33.06%	362	33,794	33.42%	2,408	2.38%
024		142,189	-3,998	-2.73%	27,943	19.65%	550	28,493	20.04%	3,064	2.15%
	VAP	101,987			19,305	18.93%	162	19,467	19.09%	1,963	1.92%
025		140,355	-5,832	-3.99%	53,328	38.00%	480	53,808	38.34%	2,160	1.54%
	VAP	106,171			38,028	35.82%	232	38,260	36.04%	1,450	1.37%
026		104,303	-41,884	-28.65%	69,673	66.80%	456	70,129	67.24%	1,159	1.11%
	VAP	74,844			46,560	62.21%	227	46,787	62.51%	801	1.07%
027		140,630	-5,557	-3.80%	31,857	22.65%	357	32,214	22.91%	1,993	1.42%
	VAP	105,513			22,516	21.34%	140	22,656	21.47%	1,414	1.34%
028		177,894	31,707	21.69%	24,475	13.76%	480	24,955	14.03%	4,873	2.74%
	VAP	126,499			16,105	12.73%	154	16,259	12.85%	3,447	2.72%
029		127,311	-18,876	-12.91%	44,530	34.98%	424	44,954	35.31%	1,946	1.53%
	VAP	91,715			29,765	32.45%	163	29,928	32.63%	1,312	1.43%
		152,140	5,953	4.07%	24,672	16.22%	827	25,499	16.76%	3,845	2.53%
	VAP	111,400			16,557	14.86%	232	16,789	15.07%	2,638	2.37%
031		178,384	32,197	22.02%	15,977	8.96%	556	16,533	9.27%	6,005	3.37%
	VAP	127,402			10,666	8.37%	150	10,816	8.49%	3,805	2.99%
032		139,625	-6,562	-4.49%	26,393	18.90%	1,008	27,401	19.62%	10,452	7.49%
	VAP	110,149			18,822	17.09%	552	19,374	17.59%	7,397	6.72%
033		151,136	4,949	3.39%	55,279	36.58%	1,514	56,793	37.58%	23,610	15.62%
	VAP	111,274			36,648	32.93%	726	37,374	33.59%	16,277	14.63%
034		167,138	20,951	14.33%	61,563	36.83%	1,362	62,925	37.65%	7,628	4.56%
	VAP	118,865			39,748	33.44%	625	40,373	33.97%	4,894	4.12%
035		125,690	-20,497	-14.02%	97,932	77.92%	1,190	99,122	78.86%	7,117	5.66%
	VAP	90,002			67,730	75.25%	688	68,418	76.02%	4,763	5.29%
036		116,232	-29,955	-20.49%	76,187	65.55%	931	77,118	66.35%	6,957	5.99%
	VAP	87,124			51,990	59.67%	601	52,591	60.36%	5,273	6.05%
037		229,458	83,271	56.96%	21,914	9.55%	995	22,909	9.98%	10,891	4.75%
	VAP	162,591			14,842	9.13%	420	15,262	9.39%	7,335	4.51%
038		116,658	-29,529	-20.20%	91,401	78.35%	790	92,191	79.03%	3,659	3.14%
	VAP	84,661			64,325	75.98%	533	64,858	76.61%	2,647	3.13%
039		123,507	-22,680	-15.51%	72,674	58.84%	930	73,604	59.60%	6,273	5.08%
	VAP	101,803			55,052	54.08%	665	55,717	54.73%	5,105	5.01%

2a

DISTRICT		POPULATION	DEVIATION	% DEVIATION	BLACK	% BLACK	BLACK COMBO	TOTAL BLACK	%TOTAL BLACK	HISP.OR LATINO	%HISP.
040		140,331	-5,856	-4.01%	13,448	9.58%	705	14,153	10.09%	11,380	8.11%
	VAP	114,057			10,457	9.17%	457	10,914	9.57%	8,748	7.67%
041		150,807	4,620	3.16%	26,282	17.43%	1,088	27,370	18.15%	27,004	17.91%
	VAP	116,331			18,901	16.25%	635	19,536	16.79%	19,556	16.81%
042		136,137	-10,050	-6.87%	14,238	10.46%	937	15,175	11.15%	30,333	22.28%
	VAP	114,069			11,132	9.76%	621	11,753	10.30%	22,993	20.16%
043		156,321	10,134	6.93%	140,408	89.82%	1,811	142,219	90.98%	2,531	1.62%
	VAP	108,005			95,006	87.96%	1,019	96,025	88.91%	1,688	1.56%
044		144,072	-2,115	-1.45%	76,260	52.93%	1,672	77,932	54.09%	12,511	8.68%
	VAP	101,654			49,657	48.85%	788	50,445	49.62%	8,470	8.33%
045		160,789	14,602	9.99%	29,435	18.31%	568	30,003	18.66%	6,379	3.97%
	VAP	115,956			19,331	16.67%	189	19,520	16.83%	4,447	3.84%
046		149,918	3,731	2.55%	32,625	21.76%	692	33,317	22.22%	7,837	5.23%
	VAP	117,899			22,554	19.13%	316	22,870	19.40%	5,414	4.59%
047		145,534	-653	-0.45%	18,446	12.67%	317	18,763	12.89%	3,121	2.14%
	VAP	108,365			12,913	11.92%	81	12,994	11.99%	2,050	1.89%
048		311,367	165,180	112.99%	21,535	6.92%	1,089	22,624	7.27%	19,928	6.40%
	VAP	217,625			14,837	6.82%	440	15,277	7.02%	13,567	6.23%
049		180,172	33,985	23.25%	10,199	5.66%	386	10,585	5.87%	28,694	15.93%
	VAP	131,625			7,015	5.33%	144	7,159	5.44%	18,413	13.99%
		159,954	13,767	9.42%	5,690	3.56%	323	6,013	3.76%	5,196	3.25%
	VAP	123,562			4,241	3.43%	114	4,355	3.52%	3,346	2.71%
051		167,169	20,982	14.35%	3,047	1.82%	241	3,288	1.97%	8,933	5.34%
	VAP	125,352			2,122	1.69%	73	2,195	1.75%	6,211	4.95%
052		133,716	-12,471	-8.53%	14,831	11.09%	414	15,245	11.40%	5,964	4.46%
	VAP	99,542			10,191	10.24%	95	10,286	10.33%	3,918	3.94%
053		126,744	-19,443	-13.30%	5,861	4.62%	298	6,159	4.86%	5,705	4.50%
	VAP	95,213			4,485	4.71%	69	4,554	4.78%	3,556	3.73%
054		148,246	2,059	1.41%	3,510	2.37%	427	3,937	2.66%	16,580	11.18%
	VAP	108,420			2,428	2.24%	104	2,532	2.34%	10,305	9.50%
055		142,187	-4,000	-2.74%	105,181	73.97%	2,938	108,119	76.04%	5,695	4.01%
	VAP	100,937			71,405	70.74%	1,678	73,083	72.40%	3,965	3.93%
056		199,873	53,686	36.72%	13,524	6.77%	839	14,363	7.19%	13,588	6.80%
	VAP	147,412			9,680	6.57%	426	10,106	6.86%	9,902	6.72%

Total Population: 8,186,453

Ideal Value: 146,187

Summary

Population Range: 104,303 to 311,367

Absolute Range: -41,884 to 165,180

Absolute Overall Range: 207,064

Relative Range: -28.65% to 112.99%

Relative Overall Range: 141.64%

Plan Name: **senplan2u** Plan Type: **SENATE** User: **jstanton** Administrator: **S008**

DISTRICT		POPULATION	DEVIATION	% DEVIATION	BLACK	% BLACK	BLACK COMBO	TOTAL BLACK	%TOTAL BLACK	HISP.OR LATINO	%HISP.
001		153,484	7,297	4.99%	14,737	9.60%	547	15,284	9.96%	3,299	2.15%
	VAP	113,228			9,756	8.62%	201	9,957	8.79%	2,106	1.86%
002		138,970	-7,217	-4.94%	76,423	54.99%	841	77,264	55.60%	2,667	1.92%
	VAP	103,448			51,618	49.90%	426	52,044	50.31%	1,936	1.87%
003		149,694	3,507	2.40%	53,691	35.87%	1,510	55,201	36.88%	8,660	5.79%
	VAP	105,473			35,076	33.26%	497	35,573	33.73%	5,650	5.36%
004		150,364	4,177	2.86%	48,278	32.11%	504	48,782	32.44%	6,183	4.11%
	VAP	113,523			34,385	30.29%	249	34,634	30.51%	4,217	3.71%
005		151,166	4,979	3.41%	39,797	26.33%	1,635	41,432	27.41%	37,643	24.90%
	VAP	112,681			27,576	24.47%	869	28,445	25.24%	26,661	23.66%
006		138,899	-7,288	-4.99%	43,089	31.02%	1,454	44,543	32.07%	20,068	14.45%
	VAP	109,670			30,393	27.71%	809	31,202	28.45%	14,296	13.04%
007		139,647	-6,540	-4.47%	35,467	25.40%	540	36,007	25.78%	4,954	3.55%
	VAP	99,839			23,524	23.56%	194	23,718	23.76%	3,122	3.13%
008		140,221	-5,966	-4.08%	52,466	37.42%	624	53,090	37.86%	3,694	2.63%
	VAP	102,603			35,255	34.36%	298	35,553	34.65%	2,477	2.41%
009		153,471	7,284	4.98%	14,098	9.19%	674	14,772	9.63%	9,359	6.10%
	VAP	107,166			9,264	8.64%	255	9,519	8.88%	6,119	5.71%
010		138,931	-7,256	-4.96%	90,293	64.99%	946	91,239	65.67%	2,320	1.67%
	VAP	97,753			62,194	63.62%	505	62,699	64.14%	1,484	1.52%
011		141,679	-4,508	-3.08%	50,050	35.33%	409	50,459	35.62%	4,919	3.47%
	VAP	102,408			32,261	31.50%	194	32,455	31.69%	3,151	3.08%
012		140,691	-5,496	-3.76%	75,534	53.69%	455	75,989	54.01%	2,007	1.43%
	VAP	102,262			51,581	50.44%	227	51,808	50.66%	1,337	1.31%
013		139,438	-6,749	-4.62%	43,292	31.05%	357	43,649	31.30%	6,798	4.88%
	VAP	101,468			28,182	27.77%	140	28,322	27.91%	4,635	4.57%
014		138,984	-7,203	-4.93%	52,852	38.03%	682	53,534	38.52%	4,473	3.22%
	VAP	101,443			36,035	35.52%	302	36,337	35.82%	3,010	2.97%
015		139,366	-6,821	-4.57%	75,002	53.82%	1,397	76,399	54.82%	6,338	4.55%
	VAP	100,216			50,430	50.32%	545	50,975	50.87%	4,227	4.22%
016		153,465	7,278	4.98%	54,708	35.65%	699	55,407	36.10%	4,800	3.13%
	VAP	114,015			38,349	33.64%	304	38,653	33.90%	3,402	2.98%
017		152,955	6,768	4.63%	12,868	8.41%	384	13,252	8.66%	2,883	1.88%
	VAP	108,139			8,331	7.80%	113	8,604	7.97%	1,833	1.69%
018		153,461	7,274	4.98%	19,383	12.63%	510	19,893	12.96%	3,209	2.09%
	VAP	112,277			13,399	11.93%	161	13,560	12.08%	2,150	1.91%
019		144,079	-2,108	-1.44%	34,880	24.21%	359	35,239	24.46%	7,431	5.16%
	VAP	105,127			23,915	22.75%	143	24,058	22.88%	4,691	4.46%

4a
[Statistics For Exhibit DI 2]

DISTRICT		POPULATION	DEVIATION	% DEVIATION	BLACK	% BLACK	BLACK COMBO	TOTAL BLACK	%TOTAL BLACK	HISP.OR LATINO	%HISP.
020		138,889	-7,298	-4.99%	49,817	35.87%	341	50,158	36.11%	2,389	1.72%
	VAP	101,459			33,387	32.91%	153	33,540	33.06%	1,614	1.59%
021		153,466	7,279	4.98%	7,916	5.16%	530	8,446	5.50%	7,189	4.68%
	VAP	109,243			5,321	4.87%	219	5,540	5.07%	4,831	4.42%
022		139,090	-7,097	-4.85%	76,123	54.73%	1,330	77,453	55.69%	3,305	2.38%
	VAP	99,502			50,711	50.96%	538	51,249	51.51%	2,154	2.16%
023		139,083	-7,104	-4.86%	57,747	41.52%	864	58,611	42.14%	4,322	3.11%
	VAP	102,170			38,614	37.79%	362	38,976	38.15%	3,065	3.00%
024		142,887	-3,300	-2.26%	19,965	13.97%	484	20,449	14.31%	2,852	2.00%
	VAP	103,529			13,880	13.41%	155	14,035	13.56%	1,814	1.75%
025		145,136	-1,051	-0.72%	58,442	40.27%	568	59,010	40.66%	2,572	1.77%
	VAP	108,570			40,797	37.58%	246	41,043	37.80%	1,750	1.61%
026		144,366	-1,821	-1.25%	79,313	54.94%	615	79,928	55.36%	1,893	1.31%
	VAP	105,436			53,286	50.54%	280	53,566	50.80%	1,298	1.23%
027		152,518	6,331	4.33%	5,663	3.71%	405	6,068	3.98%	6,472	4.24%
	VAP	105,080			3,803	3.62%	169	3,972	3.78%	4,412	4.20%
028		153,457	7,270	4.97%	16,423	10.70%	411	16,834	10.97%	4,064	2.65%
	VAP	109,394			10,886	9.95%	142	11,028	10.08%	2,817	2.58%
029		139,903	-6,284	-4.30%	54,906	39.25%	499	55,405	39.60%	2,289	1.64%
	VAP	101,342			36,795	36.31%	190	36,985	36.50%	1,676	1.65%
030		153,461	7,274	4.98%	16,105	10.49%	594	16,699	10.88%	2,634	1.72%
	VAP	109,440			10,442	9.54%	176	10,618	9.70%	1,689	1.54%
031		144,093	-2,094	-1.43%	19,837	13.77%	571	20,408	14.16%	6,345	4.40%
	VAP	106,800			13,796	12.92%	148	13,944	13.06%	4,236	3.97%
032		153,288	7,101	4.86%	8,584	5.60%	523	9,107	5.94%	5,218	3.40%
	VAP	116,202			6,251	5.38%	256	6,507	5.60%	3,712	3.19%
033		138,914	-7,273	-4.98%	48,187	34.69%	1,240	49,427	35.58%	15,113	10.88%
	VAP	101,318			31,863	31.45%	539	32,402	31.98%	10,071	9.94%
034		143,538	-2,649	-1.81%	76,124	53.03%	1,578	77,702	54.13%	5,560	3.87%
	VAP	100,130			49,814	49.75%	795	50,609	50.54%	3,560	3.56%
035		143,613	-2,574	-1.76%	90,178	62.79%	1,333	91,511	63.72%	7,141	4.97%
	VAP	102,621			61,584	60.01%	696	62,280	60.69%	4,677	4.56%
036		139,270	-6,917	-4.73%	86,537	62.14%	1,115	87,652	62.94%	10,459	7.51%
	VAP	105,218			59,194	56.26%	720	59,914	56.94%	8,071	7.67%
037		151,057	4,870	3.33%	12,882	8.53%	583	13,465	8.91%	5,448	3.61%
	VAP	106,260			8,593	8.09%	255	8,848	8.33%	3,602	3.39%
038		139,233	-6,954	-4.76%	88,861	63.82%	863	89,724	64.44%	7,963	5.72%
	VAP	104,463			62,389	59.72%	591	62,980	60.29%	6,042	5.78%
039		138,909	-7,278	-4.98%	83,621	60.20%	973	84,594	60.90%	4,569	3.29%
	VAP	113,462			63,469	55.94%	680	64,149	56.54%	3,573	3.15%

5a

DISTRICT		POPULATION	DEVIATION	% DEVIATION	BLACK	% BLACK	BLACK COMBO	TOTAL BLACK	%TOTAL BLACK	HISP.OR LATINO	%HISP.
040		153,264	7,077	4.84%	48,476	31.63%	1,174	49,650	32.40%	21,271	13.88%
	VAP	120,658			35,081	29.07%	724	35,805	29.67%	15,974	13.24%
041		150,406	4,219	2.89%	60,797	40.42%	1,869	62,666	41.66%	9,686	6.44%
	VAP	112,282			41,295	36.78%	980	42,275	37.65%	6,691	5.96%
042		152,967	6,780	4.64%	20,025	13.09%	1,087	21,112	13.80%	24,103	15.76%
	VAP	128,002			15,433	12.06%	746	16,179	12.64%	18,506	14.46%
043		139,178	-7,009	-4.79%	90,440	64.98%	1,319	91,759	65.93%	5,276	3.79%
	VAP	98,010			60,680	61.91%	703	61,383	62.63%	3,702	3.78%
044		149,248	3,061	2.09%	57,107	38.26%	1,398	58,505	39.20%	13,859	9.29%
	VAP	106,379			36,341	34.16%	586	36,927	34.71%	9,372	8.81%
045		153,199	7,012	4.80%	7,380	4.82%	423	7,803	5.09%	6,249	4.08%
	VAP	108,947			5,107	4.69%	117	5,224	4.79%	4,098	3.76%
046		144,159	-2,028	-1.39%	32,448	22.51%	652	33,100	22.96%	7,917	5.49%
	VAP	113,573			22,471	19.79%	306	22,777	20.05%	5,481	4.83%
047		139,724	-6,463	-4.42%	34,171	24.46%	364	34,535	24.72%	2,539	1.82%
	VAP	104,273			23,868	22.89%	114	23,982	23.00%	1,663	1.59%
048		153,460	7,273	4.98%	11,584	7.55%	627	12,211	7.96%	10,815	7.05%
	VAP	110,105			7,975	7.24%	255	8,230	7.47%	7,456	6.77%
049		153,459	7,272	4.97%	4,741	3.09%	264	5,005	3.26%	11,067	7.21%
	VAP	113,002			3,308	2.93%	75	3,383	2.99%	7,023	6.21%
050		142,998	-3,189	-2.18%	11,547	8.07%	357	11,904	8.32%	20,445	14.30%
	VAP	108,454			8,191	7.55%	134	8,325	7.68%	13,216	12.19%
051		153,457	7,270	4.97%	2,869	1.87%	226	3,095	2.02%	6,413	4.18%
	VAP	116,084			1,969	1.70%	83	2,052	1.77%	4,285	3.69%
052		150,070	3,883	2.66%	17,413	11.60%	510	17,923	11.94%	12,389	8.26%
	VAP	112,820			12,413	11.00%	125	12,538	11.11%	7,971	7.07%
053		153,459	7,272	4.97%	3,303	2.15%	361	3,664	2.39%	6,380	4.16%
	VAP	114,267			2,284	2.00%	77	2,361	2.07%	4,022	3.52%
054		153,025	6,838	4.68%	5,066	3.31%	378	5,444	3.56%	12,788	8.36%
	VAP	110,782			3,496	3.16%	92	3,588	3.24%	8,113	7.32%
055		138,924	-7,263	-4.97%	86,109	61.98%	2,225	88,334	63.58%	4,657	3.35%
	VAP	97,091			57,626	59.35%	1,251	58,877	60.64%	3,156	3.25%
056		152,320	6,133	4.20%	11,927	7.83%	702	12,629	8.29%	9,871	6.48%
	VAP	117,512			8,828	7.51%	383	9,211	7.84%	7,361	6.26%

Total Population: 8,186,453

Ideal Value: 146,187

Summary

Population Range: 138,889 to 153,484

Absolute Range: -7,298 to 7,297

Absolute Overall Range: 14,595

Relative Range: -4.99% to 4.99%

Relative Overall Range: 9.98%

WHITE DEM

STRONGER RETRO

Comparison of BLK VAP in submitted State Senate Map

≤ 2.5% DEV

Dist	Submitted %Blk VAP	Submitted %BlkREG00	Benchmark %Blk VAP	Benchmark %BlkREG00	Benchmark % Dev	Georgia Equal %Blk VAP	Georgia Fair %Blk VAP	Coalition 1 %Blk VAP	Coalition 2 %Blk VAP	SenPlan 3 %Blk VAP *	Stafflejrev %Blk VAP *
2	50.13	48.42	60.58	62.38	-24.37	54.08	54.7	55.24	54.40	55.27	53.75
12	50.66	47.46	55.43	52.48	-17.77	54.43	60.37	52.48	54.00	50.41	53.96
15	50.87	50.25	62.05	72.69	-26.94	57.14	58.33	57.26	55.50	55.75	51.77
22	51.51	49.44	63.51	64.07	-25.77	56.2	56.2	48.31	48.60	60.46	55.87
26	50.8	48.27	62.45	62.79	-28.81	55.15	52.43	54.21	55.00	57.91	52.76
34/44	50.45	49.5	49.62	53.72	-1.45	57.93	56.48	57.93	57.93	57.26	49.03
10	64.14	63.06	70.66	69.81	-21.42	54.48	57.86	54.48	54.48	59.38	68.64
35	60.69	64.73	76.02	81	-14.02	59.46	58.97	61.52	60.11	64.51	60.2
36	56.94	58.65	60.36	61.39	-20.49	54.63	57.77	54.63	54.63	60.06	55.97
38	60.29	60.38	76.61	75.33	-20.2	59.27	59.32	59.43	59.43	59.75	53.13
39	56.54	59.79	54.73	59.46	-15.51	63.26	61.7	62.64	62.64	60.81	55.86
43	62.63	63.11	88.91	89.14	6.93	59.21	60.8	59.21	59.21	57.26	88.46
55	60.64	60.99	72.4	73.07	-2.74	58.72	57.12	58.72	58.72	58.14	65.47
23	RURAL						52.43				
42	URBAN					57.05	56.3	57.05	57.05		
VRA Total:	13		13			14	15	14	14	13	13
	7>52%		12>54%			14>54%	15>54%	13>52%	13>54%	12>55%	12>51%

SEMI-URBAN

URBAN

SD 44: 1998 STARR +864
2000 +643

SD 2: 2000 THOMAS +73

SD 12: 1998 MVB +480

27% = 15 SEATS

EXHIBIT
DI32

BEST AVAILABLE COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF GEORGIA, Plaintiff, v. JOHN ASHCROFT, in his official capacity as Attorney General of the United States; RALPH F. BOYD, JR., in his official capacity as Assistant Attorney General of the United States; and THE UNITED STATES OF AMERICA, Defendants.	Civil Action No. 1:01 CV 02111 (EGS HTE LFO) 3-Judge Court

UNITED STATES' RESPONSE TO MOTION OF PATRICK L. JONES AND ROIELLE L. TYRA TO INTERVENE AS DEFENDANTS

The United States, Defendant in the above-captioned action under section 5 of the Voting Rights Act of 1965 ("the Act"), 42 U.S.C. 1973c ("Section 5"), hereby submits this response to the motion of Patrick L. Jones and Roielle L. Tyra to intervene as defendants.[1]

The United States does not oppose the movants' request to intervene by permission of the Court under Fed. R. Civ. P. 24(b). However, the United States does not agree that these intervenors, or any party wishing to intervene

[1] On November 30, 2001, the original motion to intervene was amended to include two additional movants, Della Steele and Georgia Benton.

as a defendant in this case, must be accorded intervention as a matter of right pursuant to Fed. R. Civ. P. 24(a).

The movants expressly do not contend that any federal statute provides them with an unconditional right to intervene in this action pursuant to Fed. R. Civ. P. 24(a)(1). The movants instead contend that their interests are not adequately represented by the existing parties and that they should be permitted to intervene pursuant to Fed. R. Civ. P. 24(a)(2). The movants have not cited any Section 5 declaratory judgment actions in which this Court has permitted intervention of right due to inadequacy of representation by the United States.

While it is true that this Court frequently has permitted intervention by minority citizens in Section 5 declaratory judgment cases, almost all of such cases were either permissive intervention under Rule 24(b), or silent on which form of intervention the court chose. *See, e.g., Bossier Parrish Sch. Bd. v. Reno,* 157 F.R.D. 133 (D.D.C. 1994) (Rule 24(b)); *City of Lockhart v. United States,* 460 U.S. 125, 129 (1983) (silent).

The United States Department of Justice is the agency specifically charged with protecting the public interest in eradicating racial discrimination in voting. It administers Section 5 by reviewing administrative preclearance submissions and by bringing suit to enforce the protections of the Act. *See* Voting Rights Act of 1965, Section 12(d), 42 U.S.C. 1973j(d). Although Congress amended the Act in 1975 to permit private "aggrieved persons" as well as the Attorney General to file enforcement actions under the Act, *see* S. Rep. No. 295, 94th Cong., 1st Sess. 39-40 (1975), no such amendment was added with regard to Section 5 declaratory judgment actions, which remained the statutory alternative to

administrative submissions to the Attorney General for preclearance of changes affecting voting. Congress has not guaranteed intervenor status in Section 5 declaratory judgment actions to private parties. In this specialized declaratory judgment litigation, carefully circumscribed by the terms of Section 5, private parties may have their voices heard by permission of the Court, just as in administrative preclearance submissions they may comment to the Attorney General at any time.[2]

As the properly named defendant in this Section 5 declaratory judgment action, the United States represents the interests of the minority voters whom Congress sought to protect when it passed the Voting Rights Act. In light of this, the prerequisites for Rule 24(a) intervention should not be assumed. *See Apache County v. United States,* 256 F. Supp. 903 (D.D.C. 1966) (three-judge court) (in Section 4(a) action for declaratory judgment to permit reimposition of literacy test for voter registration, Navajo tribe not granted intervention as of right because statute "contemplates that the Attorney General will protect the public interest").[3]

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[2] *See* 28 C.F.R. § 51.29 ("any individual or group may send to the Attorney General information concerning a change affecting voting"), § 51.29(b) ("[c]omments ... may be sent at any time"); § 51.29(c) (confidentiality protections for commenters); § 51.30(a) (Justice Department is obliged to consider comments along with submitting authority's materials and results of Department's investigation); § 51.32 (Department shall maintain a "Registry of Interested Individuals and Groups"); § 51.33 (Department must give individuals and groups listed in registry weekly notice of submissions received).

[3] This action is readily distinguishable from the principal case cited by the movants, *Trbovich v. United Mine Workers of America,* 404 U.S. 528 (1972), which involved a union worker, his union and the Labor Department. The intervenor in that case sought to protect his

(Continued on following page)

This Court has discretion to hear from the proposed intervenors, or any private parties who wish to intervene by permission under Rule 24(b), without inquiring into whether the United States or the Justice Department inadequately represents those parties' interests. The United States does not believe that intervention by the movants at this time would unduly delay or disrupt this action, so long as the movants are required to meet the same schedules as the Plaintiff and the United States. Accordingly, the United States does not oppose permissive intervention pursuant to Rule 24(b) for the movants.

In view of the agreed need to expedite these proceedings, the Court might wish to consider setting a

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own specific individual rights guaranteed by the federal statute under which the proceeding was brought, and the Supreme Court considered the United States to be acting in a unique dual representational capacity that was crucial to the Court's decision. 404 U.S. at 538-39. In this case, by contrast, the movants' stated interest – the issue of whether the proposed redistricting plans have the purpose or effect of causing a retrogression in minority voting strength – is precisely the same as that of the United States. The only other authority cited by the movants, *United States v. State of Georgia*, 1996 WL 453543 (N.D. Ga. 1996), is not on point. That case was a Section 5 enforcement action in which the intervenor-applicants were denied intervention because their asserted interest was too speculative. The court in that case made no finding that the United States inadequately represented the applicants' interests.

reasonable deadline by which any further applications for intervention must be filed.

Respectfully submitted,

ROSCOE C. HOWARD. JR.
United States Attorney

RALPH F. BOYD, JR.
Assistant Attorney General
Civil Rights Division

/s/ David J. Becker
JOSEPH D. RICH
(D.C. Bar No. 463885)
ROBERT A. KENGLE
DAVID J. BECKER
JAMES THOMAS TUCKER
BRUCE GEAR
(D.C. Bar No. 463388)
JAMES D. WALSH
Attorneys, Voting Section
Civil Rights Division
Department of Justice
950 Pennsylvania Ave. NW
Washington, D.C. 20530
(202) 514-3090

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF GEORGIA,	)	
	)	
Plaintiff,	)	Civil Action
	)	No. 1:01 CV 02111
v.	)	(EGS HTE LFO)
	)	
JOHN ASHCROFT, in his official capacity as Attorney General of the United States; RALPH F. BOYD, JR., in his official capacity as Assistant Attorney General of the United States; and THE UNITED STATES OF AMERICA,	)	3-Judge Court
	)	
	)	
	)	
	)	
	)	
	)	
Defendants.	)	

UNITED STATES' OPPOSITION TO PLAINTIFF'S MOTION TO VACATE ORDER PERMITTING INTERVENTION ON THE SENATE PLAN

On January 24, 2002, Plaintiff filed a motion asking this Court to vacate its previous order permitting intervention by four Georgia residents in order to oppose the preclearance of the proposed Senate plan. The Court has ordered that preliminary responses be filed by 9:00 p.m. on January 24.

Plaintiff concedes that all of the intervenors are black registered voters in the State of Georgia. Plaintiff argues, however, that the Court should vacate its intervention order because the intervenors lack standing on the basis of testimony elicited in recent depositions of the intervenors.

In its order granting intervention, the Court found that the intervenors had standing. A preliminary review of the Plaintiff's motion to vacate does not show that the Plaintiff has demonstrated any new facts that would require the Court to vacate its prior order. The United States therefore respectfully suggests that the instant motion should be denied.

The Plaintiff's argument with respect to Ms. Tyra and Mr. Jones assumes that any intervenor in a Section 5 declaratory judgment action concerning a redistricting plan must reside in one of the districts alleged to be retrogressive.[1] Plaintiff provides no legal authority for this assumption,[2] and the nature of this proceeding argues against it.

The central question before this Court is the purpose and effect of the proposed Senate plan in the State as whole – not as a collection of freestanding pieces. See *Beer v. United States*, 425 U.S. 130 (1976). Although the Court's factual inquiry necessarily will focus upon particular areas Section 5 preclearance must be granted or denied based

[1] The Plaintiff's motion also appears to take liberties with Ms. Tyra's testimony, for example characterizing her statement that "an African-American candidate could" be elected in proposed District 15 (emphasis added) as an "admission that an African-American candidate has a fair opportunity to be elected in the district as proposed." Plaintiff's Memorandum at p. 2.

[2] The only authority Plaintiff cites is one case involving the father and daughter of a decedent trying to intervene in a wrongful death action, and another involves the State of Nevada attempting to intervene in an action by a law firm against the Department of Energy alleging the improper award of a legal services contract. Neither case remotely concerns minority voting rights, racial vote dilution or the Voting Rights Act.

upon whether the plan has a net retrogressive effect across the State.[3] Thus, residence in any particular area or district should not be a criterion by which the Court determines standing in actions of this type.[4]

Plaintiff argues that intervenors Benton and Steele – who reside in current Senate District 2 – have no standing because they reside in a majority-white precinct. Plaintiff offers no authority for such a restrictive rule of standing, nor is there any logical reason for the precinct to which a

[3] Thus, the creation of new districts in which minority voters can elect candidates of their choice can offset retrogression that would otherwise occur due to the elimination of such districts in other parts of the state. Although there are no such new senate districts created in this case, the principle remains that it is the net statewide effect of the proposed plan that ultimately is at issue.

[4] The intervenors, like all black voters in Georgia, would suffer potential injury if the State implements a retrogressive plan. Similarly, all black voters in Georgia stand to receive the same relief – a non-retrogressive plan – should the proposed plan be denied preclearance. Indeed, Plaintiff's position elsewhere in the case – as shown by counsel's leading question in the submitted direct testimony of Linda Meggers – appears to be that "no district is an island unto itself" in redistricting. Ms. Meggers' direct testimony states:

A: "I think the terminology [regarding redistricting] I use to explain to legislators . . . is the domino or rippling effect. One district is short, it has to have population, you have a district next to it that may be okay, you know, within a plus or minus 5 percent, but by the time that you borrow enough population to make up the shortfall in one district, then that district becomes short or shorter, depending on its population. And so it's a ripple, it keeps continuing throughout the map. So, it's like pulling that piece of thread, just kind of comes unraveled."

Q: "All right. So no district is an island unto itself."

A: "No, not during redistricting."

Plaintiff's Direct Testimony of Linda Meggers, p. 28, lines 3-12.

voter is assigned to have a controlling effect upon that voter's standing.

The remainder of the Plaintiff's arguments amount to quarrels with the Intervenor's understanding of the evidence and the consistency of their political beliefs with the interests they assert, none of which would vitiate the Intervenors' interest in preventing the implementation of a retrogressive redistricting plan.

For the foregoing reasons, the Plaintiff has not demonstrated a sufficient basis for the Court to vacate its determination that the interevenors have standing to challenge the proposed Senate plan, and the Plaintiff's motion should therefore be denied.

Respectfully submitted,

ROSCOE C. HOWARD, JR.
United States Attorney

RALPH F. BOYD, JR.
Assistant Attorney General
Civil Rights Division

/s/ [Illegible]
JOSEPH D. RICH
(D.C. Bar No. 463885)
ROBERT A. KENGLE
DAVID J. BECKER
JAMES THOMAS TUCKER
BRUCE GEAR
(D.C. Bar No. 463388)
JAMES D. WALSH
Attorneys, Voting Section
Civil Rights Division
Department of Justice
950 Pennsylvania Ave. NW
Washington, D.C. 20530
(202) 514-3090

CERTIFICATE OF SERVICE

I hereby certify that on January 24, 2002, I served or caused to be served a copy of the United States' Opposition to Plaintiff's Motion to Vacate Order Permitting Intervention on the Senate Plan by e-mail and facsimile, to the following counsel:

Thurbert E. Baker
Attorney General of the State of Georgia
Dennis R. Dunn
Senior Assistant Attorney General
State Law Department
132 State Judicial Building
40 Capitol Square, S.W.
Atlanta, GA 30334-1300

Mark H. Cohen
Troutman Sanders LLP
5200 Bank of America Plaza
600 Peachtree Street, N.E.
Atlanta, GA 30308-2216

David F. Walbert
Parks, Chesin, Walbert & Miller, P.C.
26th Floor, 75 Fourteenth Street
Atlanta, GA 30309

Thomas Sampson, Sr.
Thomas, Kennedy, Sampson & Patterson
3355 Main Street
Atlanta, GA 30337

Stuart F. Pierson
Troutman Sanders LLP
401 9th Street, N.W.
Suite 1000
Washington, DC 20004-2134

E. Mark Braden
Baker & Hostetler LLP
Washington Square
Suite 1100
1050 Connecticut Avenue, N.W.
Washington, DC 20036-5304

Frank B. Strickland
Anne W. Lewis
Strickland Brockington Lewis LLP
Midtown Proscenium, Suite 1200
1170 Peachtree Street, N.E.
Atlanta, GA 30309

/s/ David J. Becker
DAVID J. BECKER

No. 02-182

OCT 23 2002

In the Supreme Court of the United States

STATE OF GEORGIA, APPELLANT

v.

JOHN ASHCROFT, ATTORNEY GENERAL, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM

THEODORE B. OLSON
Solicitor General
Counsel of Record

RALPH F. BOYD, JR.
Assistant Attorney General

MARK L. GROSS
TOVAH R. CALDERON
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the district court erred in its application of established legal standards for determining whether a change in voting practices or procedures results in retrogression that precludes preclearance under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c.

2. Whether the district court's application of settled Section 5 precedent is consistent with the Equal Protection Clause.

3. Whether private parties may intervene in a declaratory judgment action filed under Section 5 of the Voting Rights Act of 1965.

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In the Supreme Court of the United States

No. 02-182

STATE OF GEORGIA, APPELLANT

v.

JOHN ASHCROFT, ATTORNEY GENERAL, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM

OPINIONS BELOW

The opinion of the three-judge district court denying preclearance of appellant's state senate plan (J.S. App. 23a-213a) is reported at 195 F. Supp. 2d 25. The opinion of the district court granting preclearance of appellant's amended state senate plan (J.S. App. 1a-22a) is reported at 204 F. Supp. 2d 4.

JURISDICTION

The three-judge district court entered its judgment denying preclearance on April 5, 2002, and its judgment granting preclearance of the amended plan on June 3, 2002. Appellant filed a notice of appeal from both judgments on June 4, 2002. 28 U.S.C. 2101(b). This

Court has jurisdiction pursuant to 42 U.S.C. 1973c and 28 U.S.C. 1253.

STATEMENT

1. Appellant, the State of Georgia, is a covered jurisdiction subject to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. See 28 C.F.R. Pt. 51 App. Under Section 5, a covered jurisdiction may not implement changes in any "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting," unless it (1) has obtained judicial preclearance by means of a declaratory judgment from the United States District Court for the District of Columbia that the change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color," or (2) has submitted the proposed change to the Attorney General for administrative preclearance and the Attorney General has not interposed an objection. 42 U.S.C. 1973c. An action for a declaratory judgment under Section 5 is heard and determined by a three-judge district court. 42 U.S.C. 1973c; 28 U.S.C. 2284(a). In a declaratory judgment action under Section 5, the district court cannot preclear a proposed voting change unless the covered jurisdiction proves that the change will not "lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Reno* v. *Bossier Parish Sch. Bd.*, 520 U.S. 471, 478 (1997) (quoting *Beer* v. *United States*, 425 U.S. 130, 141 (1976)). The jurisdiction's existing plan—the status quo—is the benchmark against which the retrogressive effect of a proposed voting change will be measured. *Ibid.*

2. Following the 2000 census, appellant adopted redistricting plans for electing members of the United States House of Representatives and the Georgia Senate and House of Representatives. J.S. App. 42a. In October 2001, appellant filed suit in the District of Columbia requesting preclearance of its proposed redistricting plans. *Id.* at 23a. The United States did not oppose the congressional and state house plans, but did oppose the state senate plan on the ground that the reduction of black voting age population and black registered voters' population in districts 2, 12, and 26 would have a retrogressive effect prohibited by Section 5. Under the pre-existing benchmark plan, the black voting age population in those districts was 54.94% or higher, and the population of black registered voters was 52.48% or higher. Appellant's proposed plan reduced the black voting age population to 50.39% or lower and the black registered voters population to 48.42% or lower. *Id.* at 74a. Thus, appellant proposed to reduce black registered voter majorities in all three districts to below 50%. Moreover, appellant proposed to remove black voting age population out of districts 2, 12, and 26, notwithstanding the fact that those districts were all underpopulated.[1] All three districts were also

[1] Those calculations of voting age population are based on the United States' *Guidance Concerning Redistricting and Retrogression Under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c*, 66 Fed. Reg. 5412 (2001), which counts as black all non-Hispanic individuals who, in the 2000 Census, identified themselves only as black, or as black and white, but not as black and another minority race. Appellant, however, calculated the relevant voting age population by counting all black multi-racial Hispanic and non-Hispanic individuals as black. In considering the plan's retrogressive effect, the district court followed the United States' recommendation that it refrain from choosing one measurement over the other and instead, "consider[ed] *all* the record information, including total black population, black registration numbers and both BVAP [black voting age population] numbers."

marked by the presence of racially polarized voting in local elections. J.S. App. 144a.

The district court subsequently allowed four African American citizens of Georgia to intervene to challenge the legality of the entire redistricting plan. J.S. App. 214a-219a. The court, however, denied the motion to intervene of Michael B. King, an African American resident of Senate District 44, as untimely. *Id.* at 31a-35a.[2]

3. Following trial, the district court granted preclearance for appellant's congressional and state house redistricting plans, but denied preclearance for three districts in the state senate redistricting plan. J.S. App. 23a-150a. With respect to the state senate plan, the district court ruled that appellant "failed to demonstrate by a preponderance of the evidence that the reapportionment plan for the State Senate will not have a retrogressive effect." *Id.* at 144a-145a. In particular, appellant failed to prove, in light of the evidence of racially polarized voting in senate districts 2, 12, and 26,

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J.S. App. 117a. In any event, the reduction in black voting age population is slightly greater under appellant's method of calculation:

Dist.	Benchmark BVAP (Ga.)	Proposed BVAP (Ga.)	Reduction (Ga.)	Benchmark BVAP (U.S.)	Proposed BVAP (U.S.)	Reduction (U.S.)
2	60.58%	50.31%	10.27%	59.98%	49.81%	10.17%
12	55.43%	50.66%	4.77%	54.94%	50.22%	4.72%
26	62.45%	50.80%	11.65%	61.93%	50.39%	11.54%

Id. at 74a, 122a.

[2] King has appealed the district court's denial of intervention, as well as the merits judgment of the underlying action. See *King* v. *Georgia*, Nos. 02-125 & 02-425.

that the reduction of black voting age population to bare majorities or less would not significantly diminish minority voting strength in those districts.

a. In so holding, the district court found unpersuasive the testimony of appellant's expert statistical witness, Dr. Epstein. That testimony suggested that the "point of equal opportunity" for black voters to elect a candidate of their choice is a black voting age population of 44.3% or higher in an open-seat election, and 56.5% if a white incumbent is in office. J.S. App. 92a-93a. The court first noted that Dr. Epstein relied on a statistical technique that "no court has relied on" in reviewing reapportionment plans. *Id.* at 90a. Beyond that, the court explained that Dr. Epstein's "retrogression analysis" consisted simply of comparing the number of districts under the benchmark and proposed plans that have black voting age populations greater than 44.3%. *Id.* at 96a-97a. The court emphasized that Dr. Epstein's report did not consider the effect of reducing black voting age population in majority-minority districts to bare majorities, *ibid.*, and that Dr. Epstein "failed even to identify the decreases in [black voting age population] that would occur under the proposed plan, and certainly did not identify corresponding reductions in the electability of African American candidates of choice," *id.* at 121a.

Dr. Epstein, moreover, acknowledged that a drop in a district's black voting age population would result in a diminished likelihood of success for black voters' preferred candidates. J.S. App. 122a. For example, a 5.7 percentage point decrease in a district's black voting age population, from 50% to 44.3%, would result in a 25% decline in the likelihood that a candidate of choice

would be elected. *Ibid.*[3] According to appellant's method of calculation, the court found, the net reduction in black voting age population in districts 2, 12, and 26 is 10.27%, 4.77%, and 11.65%, respectively. *Ibid.*

The court further found that appellant's expert report "necessarily subsume[d] information about racial voting patterns and voter turnout." J.S. App. 127a. Beyond those assumptions, appellant "provided the court with no competent, comprehensive information regarding white crossover voting or levels of polarization in individual districts across the State." *Id.* at 133a.

The United States, by contrast, provided an expert report that documented racially polarized voting patterns in each of the contested state senate districts. J.S. App. 99a, 133a ("the United States has produced credible evidence that suggests the existence of highly racially polarized voting in the proposed districts"). The United States' expert further testified that evience of white voter crossover to support African American candidates in some elections did not dispel the racially polarized voting in local elections, such as for state senate seats. The expert explained that "the level of crossover voting tends to be considerably higher in these [statewide] elections than in the senate and other elections involving local candidates." *Id.* at 101a-102a, 128a (citation omitted). Indeed, even appellant's expert had uncovered "very high levels of polarization" in a senate election. *Id.* at 128a. The court accordingly found that, "[i]n light of the problems with the State's own statistical evidence and its inability to cast

[3] A similar decline in black voting age population, however, would have less effect if the percentage of black voting age population were significantly higher. J.S. App. 123a.

significant doubt on that presented by the United States, we are compelled to conclude that the evidence of racial polarization suggests the likelihood of retrogression." *Id.* at 133a.

Appellant also placed weight on the near unanimous support of African American legislators for the proposed redistricting plan. The court concluded, however, that their testimony was "far more probative of a lack of retrogressive purpose than of an absence of retrogressive *effect*." J.S. App. 135a.[4] More relevant to the question of regressive effect, the court found, was the testimony about minority voting strength in all three districts, and the highly polarized voting patterns and history of racially-charged political campaigns in districts 2 and 12. *Id.* at 136a-138a.

The court also found "unavailing" appellant's argument that, because population had to be added to each of the contested districts following the 2000 census, a reduction in black voting age population was necessary to comply with the equal protection principle of one person-one vote. J.S. App. 124a. The court found that appellant failed to produce any evidence in support of that contention. Indeed, the court found that the evidence revealed that "the State actually removed some majority African American precincts from each of these [contested] districts," a decision that, in the court's

[4] Appellant's continued emphasis on the "near unanimous support" of black legislators for the proposed state senate plan, see, *e.g.*, J.S. 10-11 n.2, overlooks the district court's finding that the United States "presented extensive evidence of African American Senators' misgivings about the Senate plan." J.S. App. 134a. Indeed, the court found that two black legislators voted against the plan, and that the others only voted for it because they were afraid of losing African American chairs should the Democratic Party cease to be a majority in the state senate. *Id.* at 46a.

view, "cast[] doubt on [the State's] cries of inevitability." *Ibid.* The court further found that there were alternative, reasonable plans that both would have comported with the constitutional principle of one person-one vote and would have allowed the retention of greater numbers of black voters in the disputed districts. *Id.* at 125a.

b. Based on those factual findings, the district court ruled that appellant had failed to prove that its proposed senate redistricting plan would not result in retrogression. The court explained that, under this Court's precedents, "[p]reclearance must be denied if a proposed change abridges the right to vote relative to the status quo." J.S. App. 106a (internal quotation marks omitted). Preclearance, in other words, requires "nothing more than a determination that the voting change is no more dilutive than what it replaces." *Id.* at 107a (quoting *Reno* v. *Bossier Parrish Sch. Bd.*, 528 U.S. 320, 335 (2000)). Accordingly, the court explained,

> Section 5 cases have focused almost exclusively on evaluating whether a proposed change would leave minority voters in a "worse" position than under the existing plan. The [Supreme] Court has clearly held that compliance with Section 5, and avoidance of retrogression, does not require jurisdictions to improve or strengthen the voting power of minorities. Nor does Section 5 require that redistricting plans ensure *victory* for minority preferred candidates. Rather, it is a mandate that "the minority's *opportunity* to elect representatives of its choice not be diminished, directly or indirectly, by the State's actions."

J.S. App. 107a-108a (citations omitted). The court further explained that its "analysis—while limited to the question of retrogression—is fact-intensive and must carefully scrutinize the context in which the proposed voting changes will occur." *Id.* at 111a. "In particular, the level of racially polarized voting, or the degree to which there is a correlation 'between the race of a voter and the way in which the voter votes,' sheds light on whether a decrease in districts' minority populations will produce an impermissibly retrogressive effect." *Ibid.* (citation omitted). Accordingly, "if racially polarized voting persists in an area and its electoral history demonstrates that minority voters' preferences diverge greatly from those of non-minority voters, a decrease in [black voting age population] may translate into a lessening of minority voting strength." *Ibid.*

Applying those standards, the court undertook "a searching review of the record," J.S. App. 142a, but was "not persuaded," *id.* at 144a, by appellant,

> on the basis of the evidence before it, that minority voting strength will not be significantly diminished by the proposed redistricting. The plan proposes to decrease the [black voting age population] in existing majority-minority districts such that they would constitute only bare majorities, or slightly less than majorities. It was Georgia's burden to produce some evidence to prove that these changes would not be retrogressive. The State has produced no evidence to demonstrate that the demographics of the proposed Senate Districts counteract any reduction in [black voting age population].

Id. at 144a-145a. Appellant's expert testimony was unhelpful, the court explained, because "that analysis fails to account for variations in levels of racial polarization," and appellant "presented no other evidence to

persuade us that voting in future Senate races in the contested districts will not be racially polarized." *Id.* at 133a.

The district court specifically rejected appellant's contention that "the retrogression inquiry is limited to determining whether reapportioned districts provide minority voters with an 'equal opportunity' to elect minority candidates." J.S. App. 111a-112a.

> The Supreme Court has repeatedly held that, while a Section 2 suit compares the change in voting procedures to an ideal, fair benchmark, Section 5 actions must compare the proposed plan to the existing opportunities to elect candidates of choice. Thus, as already discussed, our analysis must focus, not on the level of [black voting age population] that will ensure a "fair" or "equal" opportunity to elect preferred candidates, but on whether the proposed changes would decrease minority voters' opportunities to elect candidates of choice.

Id. at 119a-120a (citation omitted). Accordingly, appellant's expert testimony "was woefully inadequate" because it "was crafted to predict a 'point of equal opportunity' that has little relevance to the retrogression inquiry mandated by Section 5." *Id.* at 143a; see also *id.* at 121a (appellant's expert "made no attempt to address the central issue before the court: whether the State's proposal is retrogressive").

c. Judge Oberdorfer dissented, J.S. App. 161a-212a, on the ground that the plan, despite its retrogression, preserved for minorities "a fair or reasonable opportunity to elect candidates of choice." *Id.* at 189a.

4. Six days after the district court ruled, a revised state senate plan was passed by the Georgia General Assembly and signed into law by the State's governor.

J.S. App. 2a. The United States advised the district court that it would not oppose the plan as violating Section 5 of the Voting Rights Act. The intervenors, however, continued to oppose the revised plan. *Id.* at 2a-3a.

On June 3, 2002, after the parties submitted a stipulated record, the district court precleared appellant's revised state senate plan. J.S. App. 1a-22a. Because the revised plan did not strip the black voting age population in districts 2, 12, and 26 to bare majorities, the court concluded that "[t]he likelihood that retrogression will result from the 2002 plan is significantly less." *Id.* at 14a.

DISCUSSION

Appellant seeks plenary review of the district court's holding that it failed to meet its burden of proving that the proposed state senate plan would not have a retrogressive effect prohibited by Section 5 of the Voting Rights Act. Appellant, however, does not challenge any of the court's factual findings, such as the plan's decrease in black voting age population, the existence of racially polarized voting, the underpopulation of the contested districts, or the deficiencies in appellant's limited statistical evidence. Instead, appellant hinges its request for plenary review (J.S. 18-23) on the argument that Section 5 of the Voting Rights Act is satisfied as long as minorities are afforded an "equal opportunity" of electing candidates of their choice, regardless of any resulting retrogression in minority voting strength. Because that argument conflates the distinct standards and purposes of Sections 2 and 5 of the Voting Rights Act (42 U.S.C. 1973, 1973c), contrary to established precedent, the district court's decision should be summarily affirmed.

Beyond that, appellant's contention that the district court's decision trenches upon the equal protection principle of one person-one vote is belied by appellant's prompt enactment of a revised state senate plan that satisfies the Equal Protection Clause, both by complying with the principle of one person-one vote and by avoiding bizarrely shaped districts based primarily on race. Finally, nothing in the statute nor this Court's precedent supports the State's argument that private parties may not intervene in a Section 5 declaratory judgment action.[5]

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[5] While appellant's decision to seek preclearance of a new plan, following the district court's decision, and to use the new plan for the August and November 2002 elections raises the specter of mootness, on balance we believe that use of the plan does not moot the case. The new plan was adopted by the Georgia legislature because the district court denied preclearance of the proposed plan and adoption of an interim plan was necessary to conduct upcoming elections. Were the adoption of such an interim plan to moot a case, covered jurisdictions would be left with the Hobson's Choice of either delaying elections until this Court disposes of its appeal or quickly preclearing a new plan and forfeiting its right to appeal. We do not believe that traditional mootness principles or the purposes of Section 5 of the Voting Rights Act requires such a result. In any event, resolution of this case is necessary in order to ascertain the legality of using the interim plan for future elections. Although implementation of the interim plan is currently appropriate, the interim plan could lose legal force if this Court were to reverse the district court's decision and order preclearance of the original plan. In that case, this Court's decision to reverse the decision below would establish that the interim plan was used only due to the district court's legal error. Were that to occur, continued use of the interim plan, in our view, could be improper, and the original plan, if it complied with Section 5, would then become the new benchmark for measuring retrogression. See 28 C.F.R. 51.54(b)(1) ("[T]he comparison shall be with the last legally enforceable practice or procedure used by the jurisdiction."); cf. *Abrams* v. *Johnson*, 521 U.S. 74, 97 (1997) (a plan held to be an unconstitutional racial gerrymander should not serve as the Section 5 benchmark, even though it was previously precleared and implemented). Of course, upon affirmance of the decision of the district court, the interim plan will become the new benchmark. 28 C.F.R. 51.54(b)(1); see also *Texas* v. *United States*, 785 F. Supp. 201, 204 (D.D.C. 1992) (holding that an interim court-ordered plan, crafted and implemented for upcoming elections when the State's proposed plan was held invalid, was the new benchmark for evaluating a subsequently enacted plan). Because the parties thus have a legally cognizable interest in the resolution of this issue, the appeal remains justiciable. *Powell* v. *McCormack*, 395 U.S. 486, 496 (1969).

I. THE DISTRICT COURT PROPERLY APPLIED ESTABLISHED STANDARDS TO EVALUATE APPELLANT'S COMPLIANCE WITH SECTION 5's MANDATE AGAINST RETROGRESSION

Appellant contends (J.S. 20-23) that the district court committed legal error in denying preclearance under Section 5 of the Voting Rights Act, notwithstanding the uncontested retrogression in minority voting strength, because its proposed plan satisfies Section 2 of the Voting Rights Act by allegedly affording minority voters an "equal opportunity" to elect candidates of their choice. This Court, however, has "consistently understood" that Section 2 and Section 5 of the Voting Rights Act "combat different evils and, accordingly, [] impose very different duties upon the States." *Reno* v. *Bossier Parish Sch. Bd.*, 520 U.S. 471, 477 (1997) (*Bossier I*). The two Sections "differ in structure, purpose, and application." *Holder* v. *Hall*, 512 U.S. 874, 883 (1994).

Section 2 bars all States and their political subdivisions from maintaining any "voting qualification or prerequisite to voting or standard, practice, or procedure" which "results in a denial or abridgement of the

right * * * to vote on account of race or color." 42 U.S.C. 1973(a). A violation of Section 2 is established "if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by [racial minorities] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. 1973(b).

By contrast, Section 5 applies only to certain States and political subdivisions, *Bossier I*, 520 U.S. at 477, and its purpose "has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise," *Beer* v. *United States*, 425 U.S. 130, 141 (1976).

> Section 5 was a response to a common practice in some jurisdictions of staying one step ahead of the federal courts by passing new discriminatory voting laws as soon as the old ones had been struck down. * * * Congress therefore decided, as the Supreme Court held it could, "to shift the advantage of time and inertia from the perpetrators of the evil to its victim," by "freezing election procedures in the covered areas unless the changes can be shown to be nondiscriminatory."

Beer, 425 U.S. at 140 (quoting H.R. Rep. No. 196, 94th Cong., 1st Sess. 57-58 (1975) (internal quotation marks and citations omitted)); accord *Bossier I*, 520 U.S. at 477.

In short, while a Section 2 case inquires whether plaintiffs "have an equal opportunity to participate in

the political processes and to elect candidates of their choice," *Thornburg* v. *Gingles*, 478 U.S. 30, 44 (1986) (internal quotation marks and citations omitted), a preclearance action under Section 5 "requires a comparison of a jurisdiction's new voting plan with its existing plan," *Bossier I*, 520 U.S. at 478, "to determine whether retrogression would result from the proposed change," *Holder*, 512 U.S. at 883. Section 5 thus mandates that "the ability of minority groups * * * to elect their choices to office" not be diminished, *Beer*, 425 U.S. at 141, not (as Section 2 requires) that the opportunity be "equal[]" to that of "other members of the electorate," 42 U.S.C. 1973(b). Section 5 "prevents nothing but backsliding, and preclearance under § 5 affirms nothing but the absence of backsliding." *Reno* v. *Bossier Parish Sch. Bd.*, 528 U.S. 320, 335 (2000) (*Bossier II*).

Appellant's challenge to the district court's decision accordingly asks the wrong legal question. Appellant does not seek review of the court's findings of fact concerning the decrease in black voting age population, the existence of racially polarized voting, the absence of offsetting gains for minorities under the plan, or the ineffectiveness of appellant's statistical evidence. Nor does appellant seek review of the application of established Section 5 retrogression precedent to those facts. Appellant, in short, does not deny that its plan results in retrogression. Appellant argues only that such retrogression—which always has been regarded as a violation of Section 5 of the Voting Rights Act—should be excused or tolerated because of appellant's compliance with a separate legal standard—Section 2 of the Voting Rights Act. This Court, however, specifically warned against conflating the standards for compliance with Section 2 and Section 5 in *Bossier I*. In that case, the Court rejected the converse of appellant's

argument—the contention that a Section 2 violation necessarily established a violation of Section 5:

> [R]ecognizing § 2 violations as a basis for denying § 5 preclearance would inevitably make compliance with § 5 contingent upon compliance with § 2. Doing so would, for all intents and purposes, replace the standards for § 5 with those for § 2. Because this would contradict our longstanding interpretation of these two sections of the Act, we reject appellants' position.

520 U.S. at 477. It makes no more sense to argue, as appellant does, that the absence of a Section 2 violation necessarily signifies the absence of a Section 5 violation. "Doing so would, for all intents and purposes, replace the standards for [Section] 5 with those for [Section] 2." *Ibid.*[6] That does not mean that evidence suggesting the lack of a Section 2 violation is irrelevant in the Section 5 analysis; it just means that, contrary to appellant's contention, it is not dispositive of the Section 5 inquiry.

Finally, appellant's reliance (J.S. 21) on *City of Richmond* v. *United States*, 422 U.S. 358 (1975), is misplaced. That case involved requested preclearance for a

[6] See also J.S. App. 112a n.35; *Colleton County Council* v. *McConnell*, 201 F. Supp. 2d 618, 634 (D.S.C. 2002) ("[Section] 2 looks beyond the status quo to ensure that a redistricting plan affords blacks an equal opportunity to elect the representatives of their choice as white voters enjoy. Section 5, in contrast, maintains the status quo. It only prevents 'backsliding' in those jurisdictions subject to its requirements by prohibiting the implementation of any proposed voting change that has been enacted for a retrogressive purpose, or that has a retrogressive effect on minority voting strength. Section 5 * * * 'mandates that the minority's [existing] *opportunity* to elect representatives of its choice not be diminished, directly or indirectly, by the State's actions.'") (citations omitted).

proposed annexation that would have reduced the black population of the City of Richmond from 52% to 42%. This Court concluded that, although the annexation may have had the effect of creating a political unit with a lower percentage of blacks, it did not violate Section 5 so long as the system of representation fairly reflected the strength of the black community after annexation. *Id.* at 371. That holding, however, was "nothing more than an *ex necessitate* limitation upon the effect prong *in the particular context of annexation*—to avoid the invalidation of all annexations of areas with a lower proportion of minority voters than the annexing unit." See *Bossier II*, 528 U.S. at 330-331 (distinguishing *City of Richmond*, 422 U.S. at 371) (emphasis added); see also *id.* at 330 ("[*City of Richmond*'s] interpretation of the effect prong of § 5 was justified by the peculiar circumstances presented in annexation cases."). This case does not involve an annexation. Accordingly, as in *Bossier II*, this Court should decline "to blur the distinction between § 2 and § 5 by 'shift[ing] the focus of § 5 from nonretrogression to vote dilution'" and the equal opportunity of minority voters. 528 U.S. at 336 (quoting *Bossier I*, 520 U.S. at 480).

II. THE DISTRICT COURT'S APPLICATION OF ESTABLISHED SECTION 5 PRECEDENT IS CONSISTENT WITH EQUAL PROTECTION PRINCIPLES

Appellant argues (J.S. 23-26) that the district court's interpretation of Section 5 "require[s] the drawing of supermajority minority legislative districts in order to create safe seats," J.S. 23, and that this interpretation of Section 5 violates the Equal Protection Clause, J.S. 25-26. The district court made no such holding. The district court simply held that appellant was unable to

prove that its reduction of black voting age population in each of the proposed state senate districts to bare majorities would not, in light of the history of racially polarized voting, have a retrogressive effect on minority voting strength. J.S. App. 144a-145a. In so holding, the district court properly measured the proposed state senate plan against the existing senate plan. Preclearance, therefore, required only that appellant not materially diminish the existing level of black voting age population; it did not *require* a super-majority. See *City of Lockhart* v. *United States*, 460 U.S. 125, 135 (1983) (finding no retrogression where a voting change maintained, rather than increased, the degree of discrimination against minority voters).

Beyond that, the district court's ruling did not pronounce any novel rules of law mandating super-majority districts. To the contrary, the court's ruling was "fact-intensive," and it "carefully scrutinize[d]" the particular "context in which the proposed voting changes will occur." J.S. App. 111a. Furthermore, the court emphasized that:

> The mere fact of dilution, the spreading out of minority voters, is not unlawful in the Section 5 context, at least to the extent that it does not lead to a palpable decrease in minority voting strength. * * * Accordingly, contrary to the fears expressed by plaintiff, the Voting Rights Act allows states to adopt plans that move minorities out of districts in which they formerly constituted a majority of the voting population, provided that racial divisions have healed to the point that numerical reductions will not necessarily translate into reductions in electoral power.

Id. at 114a (citation omitted).

The court explained that the operation of Section 5 in that traditional manner does not force appellant "to choose between complying with the Equal Protection[] Clause and the Voting Rights Act." J.S. App. 125a. That is because a decrease in black voting age population, which might be necessitated by the principle of one person-one vote, alone "is not enough to deny preclearance to a plan under Section 5." *Ibid.* "[R]etrogression concerns are implicated [only] when it appears that the numerical changes may diminish effective minority voting power." *Ibid.* Accordingly, the district court made clear that appellant "is free under Section 5 to reduce [black voting age population] levels in a district in order to bring that district into compliance with the Fourteenth Amendment, so long as in so doing it does not limit the ability of the remaining minority voters to elect candidates of choice." *Id.* at 125a-126a.

For that same reason, appellant's companion argument (J.S. 25) that the district court's ruling "dictates an inexorable 'ratcheting up' process," under which States lose the authority to make reasonable redistricting judgments, lacks merit. Indeed, the fact that appellant was able to craft a revised state senate plan, unopposed by the United States and precleared by the court, that retained sufficiently higher levels of black voting age populations in all three districts, see J.S. App. 1a-22a, demonstrates that appellant is capable simultaneously of satisfying its obligations under Section 5 and the Equal Protection Clause.

III. PRIVATE PARTIES MAY INTERVENE IN A SECTION 5 DECLARATORY JUDGMENT ACTION

Under Section 5, covered jurisdictions may choose among two methods of obtaining preclearance: they

can submit the proposed change to the Attorney General for administrative preclearance, or they may seek a declaratory judgment from a three-judge district court in the District of Columbia. 42 U.S.C. 1973c. In *Morris* v. *Gressette*, 432 U.S. 491 (1977), this Court held that, when administrative preclearance is pursued, private parties may not seek judicial review of the Attorney General's failure to object to a proposed change. *Id.* at 504-505.

Appellant asks this Court (J.S. 26-28) to hold that, when States pursue judicial preclearance, the Attorney General alone is the defendant and private parties may not intervene in the litigation. Appellant, however, identifies nothing in the text of the Voting Rights Act that denominates the Attorney General as the exclusive defendant in a declaratory judgment action or that otherwise precludes intervention. By eschewing administrative preclearance, moreover, appellant opted to have its compliance with Section 5 reviewed by a federal district court, whose operation is subject to the Federal Rules of Civil Procedure, including the rules governing intervention. Fed. R. Civ. P. 24.[7]

Appellant's argument that the intervenors lack standing is similarly without merit. Appellant relies (J.S. 28-30) heavily on the standing analysis undertaken in *United States* v. *Hays*, 515 U.S. 737 (1995), and other cases involving equal protection claims made pursuant to this Court's decision in *Shaw* v. *Reno*, 509 U.S. 630

[7] Indeed, the district court's grant of intervention in this case is similar to the intervention that occurred in *City of Richmond*, *supra*, where the City of Richmond sought a declaratory judgment that a proposed annexation did not have a prohibited retrogressive effect. Although the Attorney General indicated approval for the plan, a group of residents who opposed it were permitted to intervene and independently pursue the litigation. 422 U.S. at 366-367.

(1993). Those cases are inapt. Equal protection claims turn upon the existence of an individual right under the Fourteenth Amendment not to be included or excluded from a specific district based predominantly upon an individual's race. See, *e.g.*, *Hays*, 515 U.S. at 739 (explaining that the plaintiffs must show that "they, personally, have been subjected to a racial classification"). Section 5 cases, by contrast, involve the comparison of two plans to ascertain whether there is retrogression in the position of racial minorities in any district with respect to their effective exercise of the electoral franchise. *Holder*, 512 U.S. at 883-884. Accordingly,

> whether intervenors reside in the proposed or benchmark districts at issue in this matter does not affect their standing for purposes of challenging the redistricting plans as retrogressive. The plans are statewide and the drawing of one district's boundaries necessarily affects neighboring districts. Furthermore, the removal of intervenors from a majority-minority district is sufficient to provide intervenors with standing to challenge the proposed district.

J.S. App. 30a. In short, the removal of black voters from a majority-minority district constitutes "an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical" and that also is redressable by the courts. *Hays*, 515 U.S. at 743. The Jones intervenors, therefore, had standing to challenge appellant's proposed state senate plan. And, in any event, because the validity of the proposed plan was challenged by the United States, affirmance of the judgment rejecting that plan would be appropriate regardless of whether the intervention should have been allowed.

CONCLUSION

For the foregoing reasons, the judgment of the district court denying preclearance of appellant's state senate plan should be summarily affirmed.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

RALPH F. BOYD, JR.
Assistant Attorney General

MARK L. GROSS
TOVAH R. CALDERON
Attorneys

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No. 02-182

IN THE

Supreme Court of the United States

STATE OF GEORGIA,
Appellant,

v.

JOHN ASHCROFT, *et al.*
Appellees,

and

PATRICK L. JONES, *et al.*
Intervenors.

On Appeal from the United States District Court for the District of Columbia

BRIEF OF APPELLANT STATE OF GEORGIA

THURBERT E. BAKER
Attorney General of Georgia
DENNIS R. DUNN
Deputy Attorney General
THOMAS SAMPSON, SR.
THOMAS, KENNEDY, SAMPSON & PATTERSON
Atlanta, Georgia
* Counsel of Record

MARK H. COHEN
TROUTMAN SANDERS LLP
Atlanta, Georgia
DAVID F. WALBERT *
PARKS, CHESIN & WALBERT, P.C.
26th Floor, 75 Fourteenth Street
Atlanta, Georgia 30309
(404) 873-8000
Special Assistant Attorneys General

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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QUESTIONS PRESENTED

I. Whether Section 5 of the Voting Rights Act Requires the Drawing of Safe Majority-Minority Districts with Supermajority Minority Populations, Rather than Districts that Afford Minorities Equal Opportunities at Success?

II. Whether Section 5 can be Constitutionally Construed to Require the Drawing of Supermajority Minority Legislative Districts in Order to Create Safe Seats, Rather than Seats that Afford Minorities Equal Opportunities at Success?

III. Whether Private Parties Should be Allowed to Intervene in a Section 5 Preclearance Action and Assume the Role and Authority of the Attorney General?

PARTIES TO THE PROCEEDING

All parties to the proceeding below are:

State of Georgia
John Ashcroft, in his official capacity as Attorney General of the United States
Ralph F. Boyd, Jr., U.S. Assistant Attorney General, in his official capacity
United States of America
Della Steele
Georgia Benton
Patrick L. Jones
Roielle L. Tyra

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IN THE

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On Appeal from the United States District Court for the District of Columbia

BRIEF OF APPELLANT STATE OF GEORGIA

OPINIONS BELOW

The orders of the three-judge panel of the United States District Court for the District of Columbia are reported at 204 F.Supp.2d 4 (D.D.C. 2002) and 195 F.Supp.2d 25 (D.D.C. 2002), and are reproduced at J.S.1a and 23a.

JURISDICTION

This is an appeal from the order of a three-judge court denying a declaratory judgment to preclear Georgia's Senate redistricting plan under § 5 of the Voting Rights Act. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1253 and 42 U.S.C. § 1973c.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This appeal involves §§ 2 and 5 of the Voting Rights Act of 1965, 42 U.S.C. §§ 1973 and 1973c. The text of these statutes are set forth at J.S. 220a and 221a.

STATEMENT OF THE CASE

PROCEEDINGS BELOW

THE REDISTRICTING PLANS AT ISSUE: At two special sessions in 2001, the Georgia General Assembly redrew State House, Senate, and congressional districts in light of the 2000 census. All three plans either maintained or increased the number of majority black districts. For the House plan, the number of majority BPOP (black population) districts increased from 40 to 42; the number of majority BVAP (black voting age population) districts increased from 37 to 39. For the Senate plan, the number of majority BPOP districts remained at 13; the number of majority BVAP districts increased from 12 to 13. For Congress, the number of majority BPOP districts remained at 2; the number of majority BVAP districts increased from 1 to 2.[1] (P.Exs.1D, 2C, 8D, 9C, 11D, 12C).

[1] The 2000 census is the first census that allowed multiple race responses. Consistent with the Census Bureau, Georgia counted as "black" all persons who responded either as "black only" or as black in combination with any other race. Inexplicably, the DOJ contended at one point that it might be appropriate to count, as "blacks," only those multiple-race responders who responded both black and white, but not persons who responded as black and any other race. (J.S.40a). In some instances, the minuscule change in BVAP under the DOJ's alternative method could change the count of the number of majority districts. The evidence is undisputed that Georgia's methodology is correct. To avoid any possible confusion over this issue, the State introduced the testimony of Dr. Roderick Harrison, the former Chief of the Racial Statistics Branch of the U.S. Census Bureau. His uncontradicted testimony established that the State's methodology is appropriate. (P.Ex. 26).

TRIAL COURT PROCEEDINGS: This action was filed on October 10, 2001, seeking § 5 preclearance for each of the new redistricting plans. On December 19, 2001, the court directed the Department of Justice (DOJ) to identify what plans and specific districts, if any, it challenged. The DOJ responded by taking no issue with the congressional plan and, after a requested extension of time, taking no issue with the House plan either. The DOJ opposed the Senate plan, complaining about Senate Districts (S.D.) 2, 12, and 26.

A motion to intervene was filed on behalf of several African American voters who were represented by the general counsel to the Georgia Republican Party. On January 10, 2002, the court denied intervention as to the congressional plan because the DOJ did not object to that plan. The court ruled: "[T]his court will not 'accommodate the intervenors' quest for a forum in which to test a voting plan' which the United States does not contend violates the Voting Rights Act." (J.S. 217a). The Court permitted intervention as to the Senate plan, however, because that plan was challenged by the DOJ. Intervention as to the House plan was left open, pending the DOJ's final position on that plan. (J.S. 218a, n.2). By order of January 30, 2002, however, the court reversed its position and allowed intervention as to all plans, regardless of the DOJ's position. (J.S. 214a).

The court required that direct testimony of all lay witnesses be presented in advance of trial through transcript or, as the DOJ did, by affidavits prepared by counsel. Cross-examination was done by pretrial deposition. Expert reports were introduced. The only live testimony at trial was expert cross-examination. Trial occurred February 4-7, 2002, before one judge, Hon. Emmet Sullivan. Closing argument occurred February 26, 2002, before all three judges.

THE COURT'S HOLDING: In a 2-1 decision on April 4, 2002, the court precleared Georgia's congressional and House plans, but rejected the Senate plan and adopted *in toto* the

DOJ's criticisms of the three districts objected to. (J.S.142a-147a). The disagreement between Judges Sullivan and Edwards in the majority and Judge Oberdorfer in dissent boiled down to a concise legal question: Does § 5 require the drawing of safe minority districts, or is the State allowed to draw districts where minorities have "merely" equal opportunities at success? The majority held that Georgia must maintain, as *safe*, any district that previously had a supermajority minority population, even if the district was greatly underpopulated and had to be expanded to comply with one-person/one-vote requirements. As Judge Sullivan wrote:

> [I]f existing opportunities of minority voters to exercise their franchise are robust, a proposed plan that leaves these voters with merely a "reasonable" or "fair" chance of electing a candidate of choice may constitute retrogression in overall minority voting strength. (J.S.113a).

Judge Sullivan's majority opinion rejected Georgia's contention that an otherwise nondiscriminatory plan should receive § 5 preclearance, even if a supermajority, safe seat is redrawn as a seat where minorities have an equal opportunity, but are not guaranteed to win.

> Georgia contends that because its plan preserves for black voters a reasonable—or equal—chance to elect candidates of choice in the three districts at issue, the State has satisfied § 5 . . . . The State's implicit argument is that retrogression cannot exist where its proposed plan satisfies § 2. We disagree. (J.S.112a).

In so holding, the court acknowledged that none of the plans were motivated by a discriminatory or "retrogressive" purpose. (J.S.147a-149a).

Judge Edwards, joined by Judge Sullivan, wrote in concurrence:

> Our dissenting colleague argues that § 5 is satisfied whenever a covered jurisdiction adopts a plan that

> preserves an "equal or fair opportunity" for minorities to elect candidates of their choice. This is not an accurate statement of the law. (J.S.151a).
>
> . . . .
>
> When the idea of *retrogression* is taken seriously, as the dissent refuses to do, it is quite obvious that a proposed plan backslides from an existing plan if it *merely* affords the protected class an equal opportunity to elect a fixed number of candidates and the existing plan affords the protected group a significantly better than equal chance of electing that same slate of candidates. Accordingly, all other things being equal, a state that converts a safe district into one where African Americans have only a "fair opportunity" would be hard pressed to preclear its plan under the § 5 analysis described by the Supreme Court. (J.S.152a; emphasis partly added).

Judge Edwards further wrote that "neither the Supreme Court nor any other court, has held—or even hinted—that preclearance under § 5 must be granted to a plan that protects equal electoral opportunities for minority voters." *Id.* 153a. According to Judge Edwards, Judge Oberdorfer's contrary conclusion was a "legal error infect[ing] the whole of the dissent's analysis." *Id.* At closing argument, Judge Edwards expressed his disagreement with this Court's voting rights jurisprudence:

> The problem is, as you well know, the status quo analytically makes no sense when we have demographics that are changing, or you have one person one vote. It is a bogus—I mean unfortunately the [Supreme] court does not make it easy for us in some of these cases. To say, let's look at the status quo, is kind of dumb, when you cannot look to the status quo because by definition it is impermissible. (Tr. 128-29, 2/26/02).

Judge Oberdorfer dissented as follows:

> Neither the text of § 5 nor authoritative decisions interpreting it require the preservation of super or "robust"

majorities that would guarantee election of the minority candidate of choice; the statute and precedents "merely mandate that the minority's *opportunity* to elect representatives of its choice not be diminished, directly or indirectly, by the State's actions." *Bush v. Vera*, 517 U.S. 952, 983 (1996). (J.S.187a; emphasis in original).

. . . .

It is my view that § 5 does not prevent a state from adopting a redistricting plan, with the blessing of African American legislators, that reduces "packed" concentrations of black voters so long as it preserves equal or fair opportunities for minorities to elect candidates of choice. It may well be that supermajorities of black voters under the benchmark plan create "robust" opportunities to elect a candidate of choice. But under the law of unintended consequences, they may also create conditions that are "unfair," "unreasonable," and "unequal," to both minority voters in those districts whose votes are "wasted," to the point that they may find it unnecessary to turn out and vote, and to non-minority voters in those districts whose voting interests might well be "submerged" by the supermajority to the point that they turn away from the political process. The Voting Rights Act does not countenance, let alone require, such a result.

The Constitution and the Voting Rights Act do not guarantee victory to minority candidates, but only equal opportunity. (J.S.206a-07a; citation omitted).

. . . .

There is "no vested right of a minority group to a majority of a particular magnitude unrelated to the provision of a reasonable opportunity to elect a representative." (J.S. 207a; citation omitted).

THE AMENDED SENATE PLAN AND SUBSEQUENT PROCEEDINGS: With the district court's ruling, Georgia was left with no enforceable plan for the 2002 elections. The district court agreed to retain jurisdiction and allowed the State 20 days to enact and submit a revised Senate plan. (J.S. 2a). The General Assembly immediately passed a plan that raised the BVAPs in S.D. 2, 12 and 26 to levels that would satisfy the DOJ. The revised districts included all of the contiguous black majority areas desired by the DOJ and excluded all the white precincts to which the DOJ had objected. (J.S 6a, 17a-18a, 20a). The BVAPs and BPOPs in the revised plan were thereby increased substantially, as follows (J.S. 5a):

	BPOP%		BVAP%	
S.D.	2001 Plan	Rev'd Plan	2001 Plan	Rev'd Plan
2	55.60	59.47	50.31	54.50
12	54.01	58.66	50.66	55.04
26	55.36	60.32	50.80	55.45

The DOJ did not object to the amended plan, and the district court approved it over intervenors' continued objections.

The amended Senate plan is an interim remedy that, by the express terms of the statute, will lapse upon the original plan receiving § 5 preclearance. (2002 Ga. Laws 148, 149, Act No. 444, § 1(b); J.S. 223a). Thus, there remains an active case or controversy regarding the original Senate plan that the district court rejected. Indeed, because of the continuing "benchmark" issue, this case would not be moot even if the revised plan were a permanent plan. See DOJ Motion to Affirm, p. 12, n. 5.

STATEMENT OF FACTS

GEORGIA'S REAPPORTIONMENT HISTORY: Georgia's current legislative redistricting can only be understood by looking at the preceding redistricting of 1991-92, which was dominated by the DOJ's policy of requiring racially gerrymandered, "max-black" districts. Those events are detailed in the opinions of this Court and the lower courts. See *Miller v.*

Johnson, 515 U.S. 900 (1995); *Abrams v. Johnson*, 521 U.S. 74 (1997); *Johnson v. Miller*, 929 F.Supp. 1529 (S.D. Ga. 1996) (*Johnson III*). Georgia's congressional redistricting was dictated by a "max-black" plan originally drafted by the ACLU. 515 U.S. at 907-08. Because that reapportionment was predominantly based on race and there was no compelling reason to justify the supermajority minority districts the DOJ required, the plan was unconstitutional. *Miller v. Johnson, supra*. A remedial plan was imposed by the trial court for future congressional elections. *Abrams, supra*.

The Georgia House and Senate redistricting in 1991-92 followed the exact same course in the General Assembly. Racially gerrymandered House districts had been building blocks for the Senate districts, all of which, in turn, were used as the building blocks for the congressional districts. *Johnson III*. The DOJ had required, as a condition of preclearance, that House and Senate districts be drawn to include "available" minority populations in the area. 929 F.Supp. at 1540. As a result, Georgia's House and Senate districts were almost exclusively of two kinds: Those with very high, supermajority black populations; and those with much lower minority populations (sometimes referred to as "bleached" districts). There were virtually no districts with BPOPs or BVAPs in the 40-50% range.

After this Court's *Miller* decision in 1995, the Georgia General Assembly held a special session and adopted new House and Senate plans. 929 F.Supp. at 1540. These plans unwound part of the DOJ-demanded racial gerrymanders of 1991-92, but by no means all of them. In spite of the *Miller* decision, the DOJ still denied preclearance to the modified House and Senate plans in 1996. Astonishingly, the DOJ then sued Georgia in an effort to compel use of the old, patently illegal plans. *Id*. 1541. The district court in *Johnson III* enjoined use of the 1991-92 House and Senate lines and imposed an interim remedy for the 1996 elections. Commenting on the particular districts challenged by the *Johnson III* plaintiffs, the district court found that "the record is replete with direct and circumstantial evidence that race was the predominant motivating factor in drawing the sixteen districts we have determined to be unconstitutional." *Id*.1544.

> In attempting to maximize the number of majority black districts, the DOJ dictated the number and location of these districts in its objection letters. Because there were not enough existing concentrations of black voters to allow the creation of the desired number of black districts in a manner consistent with traditional districting principles, the DOJ used computer-generated maps to ascertain where black populations were concentrated. It then required the drawing of lines, using land bridges when necessary to commandeer the necessary number of blacks into a district. *Id*. 1544-45.

Under the direction of the court, the State and the DOJ reached a mediated agreement on plans for future House and Senate elections. Those plans were adopted by the General Assembly in 1997 and precleared by the DOJ pursuant to the settlement agreement. (Pl.Stip. ¶¶ 108-111). Georgia was left with much of the redistricting residue of the DOJ's maximization strategy from 1991-92 as it approached redistricting in 2001. The re-drawn House and Senate plans were very similar to those originally passed by the General Assembly, under DOJ direction; only the flagrantly unconstitutional parts were modified. Georgia's mediated Senate plan had 11 districts with a BPOP over 50% and ten with a BVAP over 50%, based on 1990 census figures. (P.Ex. 1C). Under the 2000 census, these numbers increased and the Senate plan then had 13 districts with a BPOP over 50% and 12 districts with a BVAP of over 50%. (P.Ex. 1D).

Even as amended, Georgia's House and Senate districts consisted almost entirely of districts with either (1) very high BVAPs or (2) very low BVAPs. (P.Ex. 1D, 11D). Midrange

districts continued to be rare because of the legacy of the DOJ's efforts to require that the State keep minority voters together wherever possible.

REAPPORTIONMENT IN 2001: Maintaining Georgia's majority minority districts in the 2001 reapportionment was very challenging because population growth had left most minority districts far short of one-person, one-vote requirements. Georgia's areas of population growth were primarily in the suburbs. Minority concentrations in mature urban areas were relatively static. Thirty-two of the 37 majority BVAP House districts were between 7% and 32% short of population equality under the 2000 census. (P.Exs. 11C, 12C). Seven of the 10 majority BVAP Senate districts were between 14% and 27% short of population under the 2000 census. (P.Ex. 1C, 1D). Many of the majority-minority House and Senate districts had BVAPs of 60% and above as of 2000, with BPOPs another 4-5% higher. (P.Exs. 1D, 11D).

African Americans had a full voice in Georgia's 2001 redistricting. Thirty-four of the 180 members of the House of Representatives were African Americans, and 11 of Georgia's 56 Senators were African Americans. (Stip. ¶ 11). Six of the 29 House Reapportionment Committee members were black, and six of the 24 Senate Reapportionment Committee members were black. (J.S.43a). The vice chairman of the Senate Committee, Robert Brown, was black, and he chaired the very subcommittee that developed the Senate plan at issue. (*Id*; Tr.23, P.Ex. 22). Among black legislators, the nearly unanimous objective was "to maintain [their] districts, but not . . . waste their votes." (Tr. 20-21, P.Ex. 22). Because minority legislators believed that the "high black percentages" were a "waste of their votes," they supported substantial BVAP reductions in the existing supermajority

districts. *Id.* 21. It is undisputed that a redistricting plan could not have passed the General Assembly without substantial minority support.[2] As Senator Brown testified:

> I think the [50%] BVAP levels in the [Senate] plan give good opportunities for African American candidates. And I can tell you this. The nearly unanimous consensus from the Black Caucus in the Senate that voted for the plan would never have been there had that not been a belief shared by those senators. (Tr.29-30, P.Ex.20).

The effort to preserve minority districts without squandering minority influence in safe, supermajority districts led to the enactment of a number of legislative districts with BVAPs of 50% or slightly above. It was the overwhelming opinion of minority legislators that such districts afforded African American candidates fair opportunities to win. Senator Brown testified that these districts afforded minority candidates a "very good chance of success":

> Q. [W]ould you share your opinions with the Court concerning the ability of African American candidates to get elected in these several districts which have a BVAP of just a bit over 50%, as they were finally passed in the Senate Plan last year?
>
> A. Sure. I feel comfortable that, with a good candidate, there is a very good chance that an African American would be elected. And I think today, much more than what was true not so many years ago, there is a good farm team, I've called it that before, of African American elected officials in

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[2] In the Senate, only one African American Senator (S.D. 2) voted against the Senate plan (J.S. 56a), and she did so because of her personal desire for a district exactly as she wanted it -- which ignored the fact that 56 Senate districts had to be drawn with no one incumbent getting just what they wanted. One African American House member also voted against the House plan. (J.S. 56a, 134a). Such near unanimous support is rare in any political endeavor.

> other positions that could move up in the event of a vacancy. I think the incumbents in these districts at these BVAP levels are in very solid shape. But speaking specifically to the question of an open-seat, I think that an African American candidate would have a good chance of winning. He or she would have to have a good organization and work hard, but there's no reason why an African American can't win at a 50% BVAP. (Tr. 29-30, P.Ex. 20).

The then Senate majority leader was an African American. He testified to the same effect, that an African American candidate would have a "fair or equal opportunity" to win with a BVAP of "forty percent and above," and he was "comfortable at a 45% BVAP level." (P.Ex. 24, pp. 11-12). Georgia Congressman John Lewis also testified. He is as knowledgeable about electoral experiences in Georgia as anyone alive. Congressman Lewis testified as follows:

> I think a candidate, a good solid black candidate, would have more than a 50 percent chance of winning with a 50 percent BVAP in Georgia. Whether a black candidate wins or not in a district with that level of BVAP will depend more on the specifics of the particular candidate and his or her campaign. The kinds of things that are important in any campaign, like hard work, putting together a good organization, and so on, will make a difference. But a credible black candidate certainly has a good chance of winning a legislative seat anywhere in the State, I think, with a 50% BVAP.
>
> The state is not the same state it was. It's not the same state that it was in 1965 or in 1975, or even in 1980 or 1990. We have changed. We've come a great distance. (Tr. 17-18, P.Ex. 21).

In contrast to this compelling testimony, the DOJ offered the testimony of various people who lived in the vicinity of S.D. 2, 12, and 26. Their "direct testimony" consisted entirely

of affidavits drafted by the DOJ. Generally, these affidavits opined as to (1) the difficulty of an African American winning in new S.D. 2, 12, and 26 and (2) the existence of "racial vote polarization." When cross-examined, nearly every one of these witnesses materially contradicted their affidavits and admitted that "blacks still have a fair opportunity to elect the candidate of their choice" in the redrawn districts. See, e.g., C. Jones Depo. 63; Sherrod Depo. 97; Abrams Depo. 22-23; Barnes Depo. 59; Hart Depo. 44-45. The many admissions by the DOJ's witnesses that contradicted their conclusory affidavits are noted in Georgia's Proposed Post-Trial Findings of Fact. (PPFF pp. 108-15, 157-71, 178-92, 198-206). Judge Oberdorfer characterized the lay testimony as follows:

> I have also considered the testimony of the Department's lay witnesses, although I believe it pales in importance to the testimony of Lewis, Brown, and Walker and the expert witnesses. To the extent that discrepancies exist between declarations and depositions of the Department's lay witnesses, I accept the latter as more credible, because it represents the witnesses' own words, rather than the adoption of statements at least partially prepared by the counsel. The deposition testimony is also more comprehensive, and permits the witnesses to explain and elaborate on statements contained in the declarations. (J.S. 210a).

GEORGIA'S ELECTION EXPERIENCE 1991-2001: Georgia's election experience of the prior decade plainly showed that the high BVAPs required by the district court created unnecessarily safe districts. Minority candidate success in Georgia the past decade has been compelling. *For example, while Georgia's statewide BVAP is only 26.6%, eight of the State's 32 offices that are elected statewide are held by African Americans.*[3] (P.Ex. 25, p.3).

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[3] Five of those positions are elected judgeships; all five African American judges have won reelection. Of the other three statewide offices held by African Americans, two were initially appointed to

The undisputed evidence at trial included a database that contained all 1,258 legislative elections (Georgia House, Senate, and Congress) that occurred from 1991 through 2001. This comprehensive data included the BVAP of the district at the time of election; whether an African American candidate won; whether there was an incumbent in the race; etc. (P.Ex. 25, App. 2). This uncontradicted data revealed that African American incumbents face little chance of defeat by a white challenger in districts with BVAP levels far below 50%. There were exactly 200 such legislative elections since 1991, and the black incumbents won 199. The only exception occurred where the defeated incumbent suffered exceptionally high political "negatives;" he was under a federal corruption indictment. (P.Ex. 25, p. 16). In 18 of these elections, the BVAP ranged from 35% to 50%. *Id.*

Looking at open seat races, the African American candidate of choice won *every* election where the BVAP was 54% or higher. There were 30 such elections over the prior 11 years. (J.S. 238a-240a). There were six open seat legislative elections in the 11 year period where the BVAP ranged from 33% to 39.9%. *The African American candidate won two of those six elections. Id.* Because of the past gerrymanders, there was only one open seat election over the 11 years that fell in the 40% to 49% range. There were four open seat elections between 50% and 53.5% BVAP where the candidate of choice could be determined, and African Americans won two out of those four. *Id.*

The Senate election history over the last 11 years is equally consistent with the fact that a BVAP of 50% or more affords an excellent opportunity for an African American candidate of choice to prevail. Defendants argued at trial that no incumbent African American Senator had been elected in an

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vacancies (just as has occurred for whites) and then won reelection; the third won an open seat in 1998. (P.Ex. 25, p.3)

open seat election with a BVAP of less than 53.5%. That contention was totally disingenuous. It ignored the fact that the DOJ-orchestrated reapportionment of 1991-92 permitted virtually no Senate seats between 40 and 50% BVAP during the entire decade. As a result of the DOJ's directives, Georgia only had three Senate districts out of the total of 56 that had a BVAP level between 40% and 49%, in any year, up through 2001. (J.S. 242a). The absence of black candidates winning more frequently in this range is not a reflection of their inability to do so; it simply reflects the paucity of such districts, a direct result of the DOJ's past actions under § 5.

Furthermore, the experience in the three Senate districts that did fall in the 40-49% range belies the DOJ's contention. Of these three Senate districts, one was won and held by an African American candidate who beat a white incumbent when the BVAP was 41%. That occurred in S.D. 25 in 1994. *Id.* The BVAP in that district was lowered in 1996, after the *Miller* decision, to 36.66%. The black incumbent won reelection. Neither that incumbent nor any other minority candidate ran in that district thereafter. *Id.*

The only other two Senate districts that ever fell in the 40-49% range were S.D. 14 and S.D. 44. S.D. 14 had a white incumbent in each of the three elections when its BVAP exceeded 40%. *Id.* S.D. 44 was a rapidly transitional district. Its BVAP changed from 40.4% to 49% between 1996 and 2000. In each of those elections, the white incumbent ran and won. *Id.*

Defendants have made much of the fact that there were no open seat black winners in *Senate* districts in the 40-50% range from 1991-2001. Again, the contention is specious. *There were no open seat Senate elections in that BVAP range from 1991-2001 because of the DOJ's gerrymandering of Georgia's lines.* (J.S. 238a, 242a).

THE PARTIES' EXPERT TESTIMONY: Expert testimony was presented by all parties. Dr. David Epstein of Columbia University performed a probit analysis on all of Georgia's legislative elections from 1991 through 2001. (P. Ex. 25). Probit is a standard statistical methodology used by social scientists to determine the likelihood of a particular event, here, the likelihood of an African American candidate of choice winning a legislative election as a function of the district BVAP. (Tr. 21, 2/5/02, Morn. Sess; P.Ex. 25, pp. 9-10). Because probit focuses directly on the ultimate question of the likelihood of minority candidate success, it is especially useful in assessing voting strength. By comparison, evidence of "racially polarized voting" unfortunately says nothing about the ultimate issue of winning or losing. Dr. Epstein determined from the comprehensive election data that African American candidates of choice had an equal chance of winning an open-seat election where the BVAP was 44%, and an increasingly higher likelihood with greater BVAPs.[4] At a 50% BVAP, the likelihood of success in an open seat election was 75%. (P.Ex. 25, pp. 16-17).

The DOJ's expert, Dr. Richard Engstrom, made no assessment of the likelihood of minority-preferred candidates winning an election as a function of BVAP. (Tr. 10, 14, 2/5/02, Aft. Sess.). Neither did he offer any opinion as to whether there was retrogression under any of the plans at

[4] Dr. Epstein's analysis used more conservative assumptions regarding race and politics than are permitted by this Court's decisions. He did not count a winner of an election a minority "candidate of choice" where the BVAP was below 50%, unless the candidate was African American. Using this very conservative approach, he was especially confident that his results did not overstate the ability of African American voters to elect candidates. (P.Ex. 25, pp. 10-13). Dr. Epstein determined at the outset that a unified probit analysis was appropriate for the State as a whole because the degree of variability in racial voting patterns permitted that approach. (Tr. 68-69, 2/4/02, Aft. Sess.).

issue. *Id.* 70. Dr. Engstrom did analyze "reaggregated" election returns in the redrawn S.D. 2, 12, and 26, a methodology that looked at the election returns from prior contests in which African American candidates had run against white candidates in the same areas encompassed by the new districts. This was the only method that he had ever used to assess minority electoral chances in a proposed new district that had no election history. *Id.* Dr. Engstrom's reaggregation results indicated that Georgia's proposed S.D. 2, 12, and 26 would afford minority candidates a "very good chance" to win. *Id.* 88-89.

Dr. Engstrom also performed "racially polarized voting" calculations on various elections, but few of those elections were coextensive with the legislative districts at issue. *Id.* 19, 85, 93-98. Using a catchall definition that there was "racial polarization" whenever 50.01% or more of minority voters preferred a different candidate than 50.01% or more of white voters, Dr. Engstrom not surprisingly found "polarization" in most of the local elections the DOJ attorneys provided him to analyze. *Id.* 25. Dr. Engstrom's definition, of course, effectively guaranteed that he would find "racial polarization." With black and white candidates opposing one another, a colorblind electorate that voted randomly would produce a 50% voter/candidate correlation.

Dr. Engstrom ignored the impact of this polarization on the ability of minority preferred candidates to actually win. Indeed, while Dr. Engstrom testified that there was racial polarization in most elections he reviewed, *the African American candidates won many of those elections, and won them in districts with much lower BVAPs than the proposed S.D. 2, 12, and 26. Id.* 80-82. For example, Dr. Engstrom testified there was "polarization" in every statewide election he examined, yet all but one of those elections was won by the African American candidate with a statewide BVAP of only 26.6%. (*Id.* 85-86; P.Ex. 25, pp.3-4). *Incredibly, Dr.*

Engstrom admitted that whether the minority candidate won or lost was irrelevant to his analysis and opinions. (Tr. 85-86, 2/5/02, Aft.Sess.)

Intervenors' expert, Dr. Jonathan Katz, gave no opinions on the evidence; his sole role was to criticize plaintiff's expert's use of probit analysis. On cross-examination, however, Dr. Katz admitted that he had used the same probit methodology himself in recent testimony he had given in another case where that analysis served his purpose. (Tr. 47-58, 61, 2/6/02, Aft.Sess; P.Ex. 107).

THE SENATE DISTRICTS AT ISSUE: The record is replete with additional district specific evidence, largely uncontradicted, that African Americans had *at least* an equal opportunity to participate in the political process and elect candidates of their choice in S.D. 2, 12 and 26. A brief synopsis of the district specific evidence follows; it is set forth in detail at PPFF ¶¶ 419-555.

Senate District 26.[5] When the incumbent African American Senator Robert Brown first ran for election in 1991, he did so in unusually difficult circumstances because he ran in a rare non-partisan special election held to fill a mid-term vacancy.[6] In a nonpartisan election, African American candidates do not benefit from the significant advantages they enjoy in partisan elections.[7] Nevertheless, Brown easily won

[5] The three Senate districts challenged by the DOJ are treated out of order here because the incumbent in S.D. 26 was Robert Brown, Chair of the subcommittee that developed the Senate plan. Since the discussion of his testimony is pertinent to all of the districts, addressing his role and his district first is preferable.

[6] There were only 23 such non-partisan special elections, held to fill mid-term vacancies, out of the entire 1,258 legislative elections in Georgia over the preceding 11 years. (P. Ex. 25, App. 2).

[7] In a partisan election, the Democratic primary has a substantially greater percentage of black voters than the electorate as a whole; the Republican primary happens to consist almost entirely of white voters in Georgia. Winning the Democratic primary then allows African American nominees a greater chance of election in a partisan general election because carrying the Democratic nomination brings additional white voters to his/her candidacy. Since more than "90% of black voters support Democrats, while over 60% of white voters cast their ballots for Republicans" (P. Ex. 25, p. 17, n. 14), the increased concentration of black voters in the Democratic primary is pronounced in a district with a BVAP of 40% or 50%. The DOJ's expert, Dr. Engstrom, testified that the percentage of African American voters in the Democratic primary in a 50% BVAP district is approximately 69%. (Tr. 141-44, 2/6/02, Aft. Sess.). Dr. Engstrom also admitted the undisputed fact that an African American nominee from the Democratic primary carries a nonracial advantage in the general election in that the party "cue" will draw votes independent of race. (Tr. 11, 2/6/02, Morn. Sess.). These partisan political facts are well-established in the record, and were admitted by all of the DOJ's witnesses who spoke to the issue. See, e.g., Abrams Depo. 30, 34-35; Wright Depo. 24, 27-28, 59; Williams Depo. 46-47.

election to S.D. 26, which then had a BVAP of 52.8% and a total black voter registration of 47%. Indeed, Brown beat his popular white opponent in a landslide, 56.7% to 43.3%.[8] Subsequently, Senator Brown had no opposition from any candidate in the Democratic primary. He had opposition in the general election in 2000, winning overwhelmingly. See PPFF ¶ 535.

Under the 2000 census, old S.D. 26 was underpopulated by 28.7% from the ideal. (P.Ex. 7B). The district's BVAP under the 2000 census had also risen on account of demographic changes to 62.45%, far higher than when Robert Brown was first elected. *Id.* Senator Brown testified that S.D. 26 as redrawn would likely elect another African American, whether he ran or not; and he testified at length about the demographic trends in District 26, which were continuing to raise the minority percentage, just as had occurred from 1990 to 2000. (Tr. 17, 35, P.Ex. 20).

[8] Brown's opponent, Robert Reichert, later won a Georgia House seat.

The undisputed evidence soundly confirms Senator Brown's decade-long election experience in S.D. 26 and his opinion that the district, as redrawn, provided a strong opportunity to elect an African American candidate. The only bi-racial election contests that encompassed all of redrawn S.D. 26 were the statewide elections in which black and white candidates faced one another. Taking the precincts from those elections that were encompassed by the new S.D. 26 revealed that black candidates, in the most recent elections of 1998 and 2000, took the overwhelming majority of the total vote—ranging from the high 60's to over 70%. (P. Exs. 2D, 7B). This is the "reaggregation" methodology preferred by the DOJ expert, Dr. Engstrom. (P.Ex. 110). While Dr. Engstrom sought to minimize the significance of these statewide reaggregated figures by opining that they were "more favorable" to minority candidates than other local elections he looked at, he performed no analysis at all of whether the substantial biracial support in the many statewide elections might, in fact, indicate what could be expected in future Senate elections.

While the statewide elections indicated higher levels of black candidate success than certain local elections Dr. Engstrom looked at, he admitted that he had made no effort to even compare what portions of the constituency encompassed by the redrawn Senate districts were included in those local elections; that he indiscriminately mixed very different nonpartisan and partisan elections; that he gave the same weight to small subdistrict elections as he did to elections that occurred in a much greater portion of the electorate; and that he made no effort at all as a political scientist to investigate whether the state elections were in fact *more* probative of elections to the state offices at issue. (Tr. 19, 93-100, 2/5/02, Aft. Sess.). Dr. Engstrom also acknowledged that, when one looked at the actual *differences* between the level of preference of black and white voters for the same minority candidates, those preference differences were very similar in

the local and statewide elections (particularly when considering the partisan elections that more closely parallel Georgia's legislative elections). (P.Exs. 104-06; Tr. 71-82, 2/6/02, Morn. Sess.).

Equally compelling is the testimony given by the DOJ's own witnesses. Defendants submitted affidavits of several witnesses asserting broad conclusions that they knew of "racially polarized voting" and that it would be difficult for a black candidate to prevail in the new S.D. 26. On cross-examination, however, they gave very different testimony. For example, DOJ witness Albert J. Abrams acknowledged that he won a county-wide seat on the Bibb County Board of Education in 1998 when the BVAP was 43% and fewer than 40% of the registered voters were black. (Abrams Depo. 13-14). Abrams beat a strong opponent, a "well respected white lawyer" who was appointed thereafter as the United States Attorney for the Middle District of Georgia. *Id.* 15-16.

While Bibb County is not coextensive with S.D. 26, it does include the majority of the population in redrawn S.D. 26, and it is much closer to the confines of the new Senate district than most of the elections Dr. Engstrom looked at. Mr. Abrams admitted he received a "substantial part of the white vote," and that any "good African American candidate . . . can get a substantial crossover vote in Bibb County." *Id.* 21. Mr. Abrams also named particular African Americans in the Macon area who would "have an excellent chance of winning" were they to run for S.D. 26 as redrawn in 2001. *Id.* 45, 61. DOJ witness William Barnes admitted that a black candidate could get elected in a Senate district in the Macon area with a 50% BVAP. (Barnes Depo. 59). DOJ witness Samuel Hart also admitted that good African American candidates could draw significant white votes in the area and that there were other formidable African American candidates in S.D. 26 as redrawn if Robert Brown declined to run for reelection. (Hart Depo. 46, 51).

Senate District 2. African American Senator Regina Thomas was the incumbent in S.D. 2. Her overriding redistricting objective was to keep her district as much like it was as possible, regardless of the impact on other districts. (Thomas Depo. 124-25, 147-47, 164-65). In fact, pre-existing S.D. 2 was far short of population equality at minus 24.4% deviation. The BVAP of old S.D. 2 under the 2000 census was 60.6%. (P.Ex. 3B). Because of population changes alone, the BVAP of District 2 had to decrease. S.D. 2 as redrawn by the General Assembly was 50.3% BVAP. All African American Senators except for Thomas voted for the entire plan, including S.D. 2.

Those other African American Senators—including the Chair of the subcommittee that drew the Senate Plan, Robert Brown—believed that S.D. 2 as redrawn gave a minority candidate a good opportunity to win. (Tr. 8-9, 29-30, P.Ex. 20). Senator Thomas did not quarrel with the judgment of the other African American Senators who believed that their 50% BVAP districts afforded African Americans good opportunities at election. But even if she believed that her district BVAP was equivalent to those of other incumbent black senators (which it was),[9] she still would have voted against it because she just did not like it. (Thomas Depo. 124-25, 146-47). While Thomas opined that an *under 50%* BVAP S.D. 2 would be unlikely to lead to the election of another African American after her, in the event of an open-seat, she admitted that a district of "50 percent or better BVAP" might have sufficed "from the point of view of that being enough black voters to be satisfactory." *Id.* 146-47.

[9] Senator Thomas was apparently under the mistaken apprehension that the BVAP of her district was slightly less than 50%. Using correct census methodology, see note 1 *supra*, the BPOP and BVAP of S.D. 2 were both over 50.0% as the district was redrawn in 2001.

Senator Thomas was first elected in a run-off election in January, 2000, when her predecessor, Diane Harvey Johnson, resigned upon conviction of a felony. The DOJ put great weight on the fact that the BVAP in S.D. 2 at that time was higher than in the redrawn district, and Ms. Thomas initially won by less than 100 votes in a run-off against a white attorney from Savannah. But defendants ignore the fact that, at the regular election in November, 2000, Thomas beat her white opponent overwhelmingly, taking approximately 80% of the vote. Defendants also ignore the fact that Thomas won the seat originally without the support of any of the African American political leadership in the district; they supported her white opponent. (Thomas Depo. 142). Notwithstanding that significant fact, Senator Thomas still won, and she did so in a nonpartisan special election.

Senator Thomas testified that she had never given any thought to the relative ease of an African American candidate winning a normal partisan election, rather than a nonpartisan special election. *Id.* 129-30. Not only did other African American Senators believe that the S.D. 2 BVAP level was more than adequate, there was undisputed evidence that a number of established African American elected officials in other offices—State Representative, the Mayor of Savannah, and the like—could "step up" and run a very effective campaign for S.D. 2 if the seat were vacant. (Tr. 40-42, P.Ex. 20).

Looking at the voting precincts contained within the redrawn S.D. 2 and comparing them to voting performance in past black/white elections for statewide offices, it is undisputed that African American candidates took the overwhelming majority of the total vote against their white opponents. Thurmond, an African American who ran for Labor Commissioner in 1998, won *78.9% of the total vote* against his white opponent in the primary run-off in those precincts encompassed by the redrawn S.D. 2. Thurmond

took 71.1% of the vote in the general election in those same precincts against another white candidate. Similarly, overwhelming majorities were run up by other African American candidates opposed by whites, including Thurbert Baker, who ran for Attorney General in 1998, receiving 71.8% of the vote against a white opponent. (P. Ex. 3B).

On cross-examination, the DOJ's lay witnesses also confirmed the ability of an African American candidate to win S.D. 2 as redrawn. Richard Shinhoster admitted that an African American could win election in a majority white jurisdiction; that they "still had that opportunity, certainly;" that an African American candidate had won a city-wide office in Savannah (the core of S.D. 2) when it was majority white; and the local black community was very active politically, registering 5,000 new voters in one local election alone. (Shinhoster Depo. 37-38, 42). He also testified that black turnout was sometimes poor and that, in his opinion, an elevated BVAP was necessary to "overcome voter apathy." *Id.* 26.

Mr. Shinhoster's disagreement with the redrawn S.D. 2 was the same as that of the DOJ, that a black candidate was not *guaranteed* a win where the BVAP was 50%. As he testified, in a district with a slight majority BVAP, the black community "cannot always be *assured* that a black can be elected when the majority—when the ratio is so close." *Id.* 16. Although Mr. Shinhoster's affidavit asserted that Regina Thomas was not likely to win in District 2, on deposition he admitted that she "probably [would] be elected." *Id.* 68. DOJ witness Prince Jackson admitted that he obtained significant white support when he ran for office years earlier, and that the degree of white support for black candidates depended on who the person was, not just their race. (Jackson Depo. 7, 10, 31, 58, 61, 62). Similar admissions were made by the DOJ's other witnesses. See, e.g., Goodman Depo. 29-30, 32, 41; Johnson Depo. 40-41; D. Jones Depo. 25, 31, 33, 63. Mr.

Jones admitted that under redrawn S.D. 2 "blacks still have a fair opportunity to elect the candidate of their choice." *Id.* 63.

Senate District 12. Under the 2000 census, old S.D. 12 had a BVAP of 55.4%. As redrawn in 2001, S.D. 12 had a BVAP of 50.7%. (P. Ex. 4B). Again, it was inevitable that there would be substantial changes in S.D. 12 because it was 17.8% short of the ideal population required for population equality, and the other districts in the same Southwest Georgia area were also short of population because the State's rapid population growth had largely occurred elsewhere. As each district took in additional population, it necessarily affected other districts in domino fashion.

The election results from statewide contests that encompassed the entire area of the new S.D. 12 again illustrated that black candidates could carry a strong majority of the total vote in those precincts. For example, African American Michael Thurmond carried 66% of the vote from the S.D. 12 precincts in his successful 1998 race against a white candidate; African American Thurbert Baker took 65% of the vote against his white opponent in 1998; and David Burgess took 66% of the vote in his 2000 election against a white opponent for Public Service Commissioner. (P. Ex. 4B). Dougherty County constituted a substantial part of S.D. 12 as redrawn. The DOJ's own witnesses admitted that African Americans had won recent county-wide races there when the electorate was majority white, with successful minority candidates securing "a great deal of white support." (Sherrod Depo. 45, 49-50).

In essence, the defendants' position regarding S.D. 12 boiled down to the past failures of one African American, John White, to win that seat. White had been elected as a state Representative from a part of Dougherty County. During his career in office, he had picked up an exceptional amount of "political baggage" and had very high, very visible negatives. Among other things, White created a company by

the name of Connections Unlimited, openly designed to capitalize financially on the fact that he was a public official. As Mr. White stated to the press, he felt he had been in public life long enough, and it was fine if he made some money from that. (White Depo. 32). Mr. White acknowledged that Connections Unlimited received substantial local and state wide news coverage, and that the media portrayed his "business" as simply selling the influence he had gained through his elected office in the Georgia General Assembly: "That's how they portrayed it, correct." (White Depo. 9).

In fact, an Atlanta Constitution article used White's own words to condemn him: "After 16 years in public office, I ought to know somebody. The reason I chose the name 'Connections Unlimited' is that I've got such connections everywhere. What's the use of doing it [public office] if you can't exercise your influence at some point?" *Id.* 32, Ex. 1. When asked about the political fallout from such an article, White testified that "I would agree it would hurt among white voters, coming from a white writer and a basically white newspaper, yes." *Id.* 29. Conversely, White testified that such appearances of corruption would not affect his ability to attract black voters. *Id.* 13.

John White ran in 1996 against incumbent Mark Taylor, who is white. In that election, Taylor carried a majority of the black vote in several of the counties and nearly secured a majority in S.D. 12 overall.[10] Moreover Taylor first won election to the Senate only because he received the endorsement of the African American community. (Taylor

[10] As shown by the DOJ's expert report, White received just a shade more of the black vote than he would have gotten by random chance, i.e, just over 50%. U.S. Ex. 601, p. 14. One African American legislator bluntly testified that, "I don't think John [White] could have won the [S.D. 12] race if anybody was in it but himself." (Tr. 16-17, P.Ex. 24).

Depo. 20). That, of course, is significant confirmation of minority voting strength in S.D. 12 when the BVAP was substantially lower.

Notwithstanding John White's prominent negatives as a candidate, the DOJ relied on his election defeat in 1996 and again in 1998 as "proof" that the BVAP should be higher in S.D. 12. In so arguing, the DOJ effectively contends that the district must be drawn not to provide minority voters with equal political opportunity, but to guarantee the election of a particular African American, John White, regardless of his qualities, characteristics, history and pronounced inability to draw biracial support. The fallacy of that position is again demonstrated by the strong vote other African American candidates received in statewide races that encompass the very same precincts of the redrawn S.D. 12, as well as the success of other African American candidates in the area.

The DOJ again introduced the affidavits of several lay witnesses containing conclusions concerning how difficult it might be for an African American to win S.D. 12. But those same witnesses acknowledged, as they had to, that other African American candidates—such as Congressman Sanford Bishop—had won in the same area with lower BVAPs. Congressman Bishop has repeatedly won election (originally defeating a white incumbent) and re-election in District 2, which encompasses all of S.D. 12, at BVAPs ranging from 35% to 52%. (P. Ex. 25, App. 2). DOJ witness David Williams admitted that an African American candidate would have a "good probability of winning" in a district with a BVAP of 50%. (D. Williams Depo. 46-47). Charles Sherrod acknowledged that black candidates have won in majority white districts in the exact area encompassed by S.D. 12 by securing substantial white vote. As Mr. Sherrod testified, there is "a phenomena down here in south Georgia that we can't explain sometimes. It occurs when white people want to do their thing and they do it. Now I don't know why they

do it. They voted for Locket, they voted for Phipps under some circumstances, you know, which I do not understand." (Sherrod Depo. 97). "White people doing their thing," in Sherrod's words, are simply examples of the kind of white support for African American candidates that a John White does not receive.

SUMMARY OF THE ARGUMENT

The district court erred in holding that § 5 prohibited Georgia from adopting a Senate redistricting plan that included three districts with BVAPs of 50-51% and BPOPs of 54-55%, on the theory that these districts "only" afforded African Americans an equal, fair, or reasonable chance of victory. The majority below further erred in interpreting § 5 to require that Georgia draw supermajority, safe seats for minority candidates. This Court's decisions make it clear that the Voting Rights Act requires only that minorities have *equal* access to the political process and *equal* opportunities at electoral success. There is no requirement that states create or maintain *safe* minority seats which, among other things, actually dilute minority voting strength elsewhere by packing minority voters into certain districts. The sole purpose behind § 5 is to stop covered jurisdictions from enacting "new *discriminatory* voting laws." *Reno v. Bossier Parrish School Bd.*, 520 U.S. 471, 477 (1997). Section 5 provides no basis for rejecting Georgia's *nondiscriminatory* redistricting plan or requiring Georgia to pack minority voters into safe seats with virtually guaranteed results.

If § 5 were construed as the district court has done, the statute would be unconstitutional. The procedural restrictions of § 5 already stretch congressional authority to the outer limit. That limit would be transgressed if Georgia were now precluded from adopting nondiscriminatory redistricting plans because some other plan could be drawn that contained safe seats. In order to stand on constitutional underpinnings, § 5 must be construed so as to prohibit actual voting dis-

crimination. Those underpinnings would vanish if the statute were now expanded, in accord with the district court's interpretation, to require the enactment of safe minority seats in the place of the State's nondiscriminatory plan, a plan that enjoyed the overwhelming support of African American legislators. The district court's ruling would dictate an evolving "ratcheting up" process, whereby states such as Georgia would ultimately be required to have as many supermajority, safe districts as possible. That would deprive Georgia of its authority to select among other nondiscriminatory redistricting plans, and would do so without constitutional justification.

The district court erred in allowing several voters to intervene in this § 5 preclearance action. Private parties have no substantive rights under § 5. This special statutory proceeding is unique in our federal system, and the plaintiff jurisdiction and the Attorney General are the only proper parties. The district court here allowed intervenors to challenge and litigate Georgia's House and Congressional Plans —and other aspects of its Senate Plan—that the DOJ was satisfied with. Private parties should not be allowed to arrogate to themselves the role and authority of the Attorney General. Because § 5 preclearance is no bar to any private right or claim that may otherwise exist, denial of intervention to voters cannot prejudice their legitimate legal rights in any way.

ARGUMENT

I. BECAUSE SECTION 5 OF THE VOTING RIGHTS ACT DOES NOT REQUIRE THE DRAWING OF SAFE MINORITY DISTRICTS WITH SUPERMAJORITY MINORITY POPULATIONS, GEORGIA'S SENATE PLAN SHOULD HAVE BEEN PRECLEARED.

A. The Attorney General's and the District Court's Interpretation of Section 5.

The DOJ has long used § 5 to compel the enactment of districts with high minority populations, leaving other districts overwhelmingly white. Those efforts were condemned by this Court in the gerrymander litigation that resulted from redistricting after the 1990 census. See, e.g., *Bush v. Vera*, 517 U.S. 952 (1996); *Miller v. Johnson*, 515 U.S. 900 (1995); *Shaw v. Reno*, 509 U.S. 630 (1993). The DOJ's commitment to high concentration, safe minority seats remains unabated, however, as shown by their position in the district court. The evidence in this case is overwhelming that minority voters would have substantial opportunities to elect candidates of their choice in each of the disputed Senate districts as they were redrawn in 2001. That evidence came from the extensive election history within the State over the prior decade; from the very African American legislators who participated in, supported, and virtually drew the Senate plan; from the defendants' own lay witnesses; and from expert testimony. That proof was not enough for the DOJ, however, which insisted that more minority population be included in S.D. 2, 12, and 26 in order to further increase the BPOPs and BVAPs to create safe minority seats.

The district court adopted the DOJ's position in full. There is no question that the three districts at issue, S.D. 2, 12, and 26, presented minority voters and candidates with at least an equal chance to win and a full, fair opportunity to participate

in the political process. Because Georgia failed to adopt even higher BVAP levels and create safe minority seats in these districts, however, the court denied preclearance of the Senate plan. (J.S. 113a). Judge Sullivan chose to speak of "robust" districts, rather than "safe seats." Accepting the DOJ's contention, Judge Sullivan wrote that, where the BVAP in a district is high enough that the minority's opportunity to win is "robust," the BVAP cannot be reduced in a way that would leave the chance of victory less than "robust." (J.S. 113a). As Judge Sullivan further wrote, a plan that "leaves these voters with merely a 'reasonable' or 'fair' chance of electing a candidate of choice" would be retrogressive. *Id.* Based on that interpretation of § 5, the district court denied Georgia's Senate plan preclearance. The court expressly rejected Georgia's contention that the three districts at issue were legal because they "preserved[d] for black voters a reasonable—or equal—chance to elect candidates of choice." *Id.* 112a. This was true, the court concluded, even though there was no evidence of any discriminatory or retrogressive purpose. *Id.* 147a-149a.

Judge Edwards joined Judge Sullivan's opinion and wrote a separate concurrence, which was joined by Judge Sullivan. Judge Edwards used the more traditional "safe district" terminology, writing that "a state that converts a *safe* district into one where African Americans have only a 'fair opportunity'" runs afoul of § 5. (J.S. 152a) (emphasis added). Judge Edwards further wrote that a state is not entitled to preclearance merely because it "adopts a plan that preserves an 'equal or fair opportunity' for minorities to elect candidates of their choice." *Id.* 151a.

B. The Substantive Limits of Section 5.

As this Court has often noted, § 5 is an extraordinary transgression of the normal prerogatives of the states. It was originally enacted to complement the principal provision of

the 1965 Voting Rights Act, the suspension of literacy tests. Congress included § 5 in the Act to ensure that no new changes in the laws of covered jurisdictions would be implemented that would undercut voter registration gains achieved by the literacy test ban. *South Carolina v. Katzenbach*, 383 U.S. 301 (1966). Section 5 was initially enacted as a "temporary" measure to last five years precisely because it was so intrusive. It has been extended three times, most recently in 1982 for another 25 years.

Because § 5 is such a grave intrusion into the authority of the states, its substantive range is limited. The underlying purpose of § 5 was explained in *Beer v. United States*, 425 U.S. 130, 140-41 (1976):

> By prohibiting the enforcement of a voting-procedure change until it has been demonstrated to the United States Department of Justice or to a three-judge federal court that the change does not have a discriminatory effect, Congress desired to prevent States from "undo[ing] or "defeat[ing] the rights recently won" by Negroes. H.R. Rep. No. 91-397, p. 8. Section 5 was intended "to insure that [the gains thus far achieved in minority political participation] shall not be destroyed through new [discriminatory] procedures and techniques." S. Rep. No. 94-295, p. 19.

The limited role of § 5 was addressed again in the *Bossier Parrish* cases. In *Bossier Parrish I*, this Court held that a proposed voting change could have an impermissible "effect" only if it led to "a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Reno v. Bossier Parrish School Bd.*, 520 U.S. 471, 478 (1997). The law was not an affirmative mandate that states adopt nondiscriminatory laws. *Id.* The DOJ's effort to minimize *Bossier Parrish I* by expansively interpreting the "purpose" term in § 5 was rejected in *Bossier Parrish II*, which held that § 5 "does not prohibit preclearance of a redistricting plan enacted with a discriminatory but nonretrogressive purpose." *Reno v. Bossier Parrish School Bd.*, 528 U.S. 320, 341 (2000).

In contrast to the limited *substantive* role of § 5, the later-enacted § 2 of the Voting Rights Act has a much broader substantive reach. It prohibits discriminatory redistrictings and other electoral practices, whether "retrogressive" or not. *Thornburg v. Gingles*, 478 U.S. 30 (1986); *Holder v. Hall*, 512 U.S. 874(1994). Under § 2, however, this Court has unambiguously held that legislative districts that provide minorities with *equal opportunities* are sufficient. There is no right to a guaranteed, safe, or "robust" seat. *Johnson v. DeGrandy*, 512 U.S. 997 (1994). While the members of the Court have not been unanimous in their interpretations of § 2, see *Holder, supra*, there is unanimous agreement that § 2 does not require maximization of minority voting strength. As Justice Souter wrote for the Court in *Johnson*:

> [T]he ultimate right of § 2 is equality of opportunity, not a guarantee of electoral success for minority-preferred candidates of whatever race. 512 U.S. at 1014, n.11.

The Court went on in *Johnson* to say the following about supermajority districts and *equal* political opportunity:

> [M]inority voters are not immune from the obligation to pull, haul, and trade to find common political ground, the virtue of which is not to be slighted in applying a statute meant to hasten the waning of racism in American politics. *Id.* 1020.

This Court's jurisprudence, the Voting Rights Act itself, and all of the underlying congressional history make it clear that it is *equal* opportunity—not safe seats or guarantees—that is the object of the law. Section 2 districting claims require, as an essential element of proof, that the voting majority "must *usually* be able to defeat candidates supported by a politically cohesive, geographically insular minority

group." *Thornburg v. Gingles*, 478 U.S. 30, 48-49 (1986). This § 2 requirement would be stood on its head under the district court's logic. The majority would convert the proof requirement that minorities be "usually defeated"—necessary for § 2 liability—into a § 5 mandate that states enact districts where minorities will win with near certainty. Section 5 cannot rationally be applied to require results far beyond what § 2 permits.

There can be no question that the majority's holding goes far beyond the requirements of § 2. Interpreting § 5 to mandate safe, supermajority districts is not only irreconcilable with the limited procedural purpose of § 5. Construing the law as the district court did flies in the face of everything this Court has ever said about § 5. The sole purpose and justification for § 5 is to stop covered jurisdictions from enacting "new *discriminatory* voting laws." *Bossier Parrish I, supra* at 477. Conversely, *nondiscriminatory* laws must be approved under § 5. *Id.*

The district court's holding that § 5 mandates the drawing of safe minority districts—which cannot arguably be required by § 2—ignores this critical distinction. The district court would permanently enjoin Georgia from using a redistricting scheme chosen by its legislators—black and white—*even though that districting scheme is not discriminatory.*

While this Court may not have unequivocally addressed the precise "safe district" issue presented here under § 5, every word the Court has written about § 5 is consistent with Georgia's position. In *Bush v. Vera*, 517 U.S. 952, 983 (1996), the Court held that § 5 "is not a license for the State to do whatever it deems necessary to ensure continued electoral *success*; it merely mandates that the minority's *opportunity* to elect representatives of its choice not be diminished . . . by the State's actions." (emphasis in

original). Because § 5 does not afford a "license" to States to create safe seats, *a fortiori* § 5 imposes no mandate upon the states to do so.

Nearly three decades ago, this Court first upheld the enactment of a nondiscriminatory election scheme under § 5 that substantially reduced the percentage of minority voters. *City of Richmond v. United States*, 422 U.S. 358 (1975). The Court there upheld an annexation that reduced the minority population of the city from a majority to 42% because the election system provided voters fair opportunities at election. As the Court held, § 5 does not require "permanent overrepresentation" as a price of avoiding retrogression. *Id.* 371.

The Court followed the logic of *City of Richmond* in *United States v. Mississippi*, 444 U.S. 105 (1980), which affirmed the district court's § 5 approval of a redistricting plan that reduced the percentages of blacks in various districts. See *Mississippi v. United States*, 490 F.Supp. 569 (D.D.C. 1979) (three-judge court). The district court in that case, citing *City of Richmond,* had held that "no racial group has a constitutional or statutory right to an apportionment structure designed to maximize its political strength." *Id.* 582.

Judge Oberdorfer's dissent sums up the majority's error in the present case as follows:

> There is no legal authority for the majority's proposition that § 5 requires that a plan preserve a pre-existing probability that a minority choice candidate prevail. To the contrary, the Supreme Court, albeit in the § 2 context, has consistently held that the Voting Rights Act aims to provide nothing more than a fair or equal opportunity, and does not guarantee "safe" seats or a "robust" chance of victory. Other lower courts have recognized, in the § 5 context, that a plan that preserves or increases the number of districts where minority voters have an equal or reasonable opportunity to elect

their candidates of choice is not retrogressive. *See Colleton County Council v. McConnell,* 2002 U.S. Dist. LEXIS 10890 *110, No. 01-3581-10 (D.S.C. Mar. 20, 2002) (three-judge court) (examining the number of majority-minority districts maintained "at a level of equal opportunity"); *see also Ketchum v. Byrne,* 740 F.2d 1398, 1419 (7th Cir. 1984) (defining retrogression as a decrease in "the number of wards in which blacks have a reasonable opportunity to elect a candidate of choice."). This does not conflate a § 5 inquiry with a § 2 inquiry. Rather, it recognizes that a simple comparison of the number of majority-minority districts under the benchmark and proposed plans, although traditionally employed by the courts, is by itself insufficient because it fails to answer the question of whether the majorities are at a level that enables "*effective* exercise of the electoral franchise," *Beer,* 425 U.S. at 141 (emphasis in original; footnote omitted). (J.S.187a-88a).

Judge Oberdorfer's opinion also discusses the unavoidable fact that supermajorities necessarily diminish African American voter influence in other districts, which is an undesirable but inevitable byproduct of drawing safe seats. This Court has expressed its concern with this very issue before. See, e.g., *Johnson v. DeGrandy, supra* at 1020, 1029. Judge Oberdorfer discussed this problem as follows:

> Moreover, the continuation of supermajorities . . . diminishes [their] opportunity to influence election elsewhere and "threatens to carry us further from the goal of a political system in which race no longer matters." *DeGrandy*, 512 U.S. at 1029 (Kennedy, J., concurring). A proposed plan that provides a fair opportunity to elect the same or greater number of candidates of choice than the benchmark plan provides is entitled to § 5 preclearance. (J.S.207; some citations omitted).

Indeed, the supermajority districts demanded by the majority below—*over the ardent opposition of the overwhelming majority of Georgia's African American legislators*—raise an obvious question as to whether Georgia would now be liable under § 2 for a minority vote packing case. That possibility has been expressly recognized by previous decisions of this Court. See, e.g., *Quilter v. Voinovich*, 507 U.S. 146, 153-54 (1993). This issue was again discussed by Judge Oberdorfer:

> Indeed, if Georgia had maintained the heavy concentrations of African-American voters in certain of its Senate and House districts, particularly in the metropolitan Atlanta area, black voters in those districts may have had a cognizable § 2 claim based on dilution of their votes through packing. (J.S.206a, n.82).

With the near universal view of minority legislators that supermajorities unnecessarily *wasted* African American votes, and with the evidence establishing an undisputed ability of African American candidates to win in districts with 50% BVAP and lower, a charge of dilution by vote packing would hardly be frivolous.

II. SECTION 5 CANNOT CONSTITUTIONALLY REQUIRE THE DRAWING OF SUPERMAJORITY MINORITY LEGISLATIVE DISTRICTS IN ORDER TO CREATE SAFE SEATS, RATHER THAN SEATS THAT AFFORD MINORITIES EQUAL OPPORTUNITIES TO WIN.

The majority's interpretation of § 5 leads to plainly unconstitutional results. As originally enacted, the Voting Rights Act did not prohibit dilutive voting systems unless the system was itself unconstitutional and motivated by a purpose to discriminate. *Rogers v. Lodge*, 458 U.S. 613 (1982); *City of Mobile v. Bolden*, 446 U.S. 55 (1980). Section 2 was amended in 1982 to prohibit electoral systems that "resulted" in discrimination, regardless of purpose. *Thornburg v. Gingles, supra*. Sections 2 and 5 are constitutional even though

they reach practices that have only a discriminatory impact, regardless of purpose. *Lopez v. Monterey County*, 525 U.S. 266, 282-84 (1999); *City of Rome v. United States*, 446 U.S. 156 (1980).

> Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into legislative spheres of autonomy previously reserved to the States. *Lopez, supra* at 282-83.

The constitutional foundation of both § 2 and § 5 is that they provide substantive protection for the legitimate rights of minority voters. By expanding § 5 beyond a ban against discriminatory practices to require that states draw safe minority districts, however, would leave this statute devoid of constitutional footing. Congress is empowered to prohibit the states from maintaining discriminatory voting laws, *Lopez*, but there is no constitutional basis for Congress to mandate the creation of safe seats with guaranteed political outcomes. That would not be legislation that eliminated discrimination.

In *Bush v. Vera, supra*, the Court addressed the constitutional power of the State to draw districts designed to do more than remedy the kind of vote dilution prohibited by § 2. The Court held in that case that it was unconstitutional for the Texas legislature to draw districts for racial purposes that were not required by § 2. Here, the district court's admitted purpose for increasing the BVAPs in Georgia's Senate was not to address voting discrimination—which was at least offered as a justification in the Texas case—but simply to create safe minority seats. Georgia could not constitutionally have drawn such districts on its own for the purpose of creating safe seats. That being the case, surely § 5 cannot be constitutionally construed to require the State to do so. Guaranteeing a particular political result is not a constitutionally legitimate goal.

The inevitable consequences of the district court's ruling point equally to its error. Under the court's holding, demographic changes from one census to another would strip covered states like Georgia of their rightful authority to make political choices. Georgia's majority BVAP districts had relatively high black majorities throughout the 1990s. Demographic changes reflected in the 2000 census increased the BVAPs even further in the existing majority minority districts. (P.Exs.1D,11D). According to the district court, once a seat thus becomes safe through demographic changes, it must be kept safe forever. Section 5 effectively imposes a one-way march towards maximization. The district court's ruling dictates an inexorable "ratcheting up" process, with Georgia losing its authority to make reasonable redistricting choices along the way. That is true even though its choices are nondiscriminatory and provide minorities with equal electoral opportunities. Judge Edwards acknowledged that this is exactly what would occur under the court's interpretation of § 5. He referred to the process approvingly as a "one-way ratchet imposed by § 5 [which] means that tangible gains made by African American voters need not be surrendered merely because the State has sought to undo those gains with a plan that is (perhaps) not independently unlawful under § 2." (J.S.152a).

If § 5 were so construed, covered states like Georgia would ultimately be compelled to have the maximum possible number of supermajority, safe districts. Section 5 would ultimately paint Georgia into a corner where its political choices would be ordained by the demographic happenstance of the past. Section 5 would have been applied to mandate what § 2 does not require, *Johnson v. DeGrandy, supra*, and § 5 would have been interpreted to mandate what this Court has repeatedly held to be unconstitutional under § 5, the purposeful creation of supermajority districts based predominantly on race. E.g., *Bush v. Vera, supra; Miller v. Johnson, supra.*

III. PRIVATE PARTIES SHOULD NOT BE ALLOWED TO INTERVENE IN A SECTION 5 PRECLEARANCE ACTION AND ASSUME THE ROLE AND AUTHORITY OF THE ATTORNEY GENERAL.

At the trial of this action, the United States did not contend that Georgia's House or congressional reapportionment plans violated § 5. As for Georgia's Senate plan, the United States contended that only three out of 56 districts were retrogressive. The district court at first denied intervention because to do so would "'accommodate the intervenor[s'] quest for a forum in which to test a voting plan' which the United States does not contend violates the Voting Rights Act." (J.S. 216a; citing *City of Dallas v. United States*, 482 F.Supp. 183 (D.D.C. 1980)). Several days before trial, however, the court reversed itself and permitted the intervenors to contest all three plans, including the congressional and House plans that were conceded by the DOJ not to be retrogressive. (J.S. 214a).

Section 5 preclearance proceedings are unique statutory creations. No other federal law so intrudes upon basic principles of federalism. *Bossier Parrish I, supra* at 479. Under § 5, state legislatures are stripped of their authority to change electoral laws in any regard until they first obtain federal sanction. The district court's expansion of § 5 proceedings to give private citizens the *same power and authority* as the Attorney General exacerbates a statutory anomaly that is already stretched to the constitutional limit.

In a § 5 administrative submission, the Attorney General alone possesses authority to object to a proposed redistricting plan. See *Morris v. Gressette*, 432 U.S. 491 (1977). In a civil action for preclearance, the Attorney General maintains his unique role as the sole statutorily designated defendant.

Not a word in the Voting Rights Act hints that private citizens possess a right to intervene and arrogate to themselves the enormous responsibilities and power of the Attorney General.

In *Morris, supra*, the Court recognized that § 5 preclearance determinations have no place for participation by third parties. The Attorney General's failure to object under § 5 is conclusive, immune from any subsequent review. The usual authority given private parties under the APA and other statutes to challenge agency decisions is inapplicable under § 5. In so holding, this Court emphasized the extraordinarily harsh nature of § 5; the need for expeditious treatment of preclearance claims; the fact that § 5 preclearance does not preclude anyone from otherwise challenging the precleared voting practice;[11] and the Attorney General's unique power and duty under § 5. *Id.* 501-07. The same considerations preclude intervention by "private attorneys general."

Other courts have agreed with appellant's opposition to intervention. In *State of Georgia v. Reno*, 881 F.Supp. 7 (D.D.C. 1995) (three-judge court), the district court denied intervention in a preclearance action, and that ruling was summarily affirmed by this Court. *Brooks v. Georgia*, 516 U.S. 1021 (1995). While four Justices indicated that they would have remanded the case for further consideration in light of the United States' withdrawal of its appeal, 516 U.S. at 1021, no Justice wrote that the denial of intervention was improper. In other cases under the Voting Rights Act, the district court has held intervention inappropriate because of the Attorney General's unique statutory role. E.g, *Apache County v. United States*, 256 F.Supp. 903 (D.D.C. 1966) (three-judge court) (bailout case under § 4(a)). In *Apache County*, the district court reasoned that "the right enforced by [the statute] is a public right, appertaining not to individual

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[11] Under the express terms of § 5, the grant of a declaratory judgment in a preclearance action does not prevent voters from pursuing any substantive claims they might have.

citizens, but to the United States itself." *Id.* 906. This Court cited *Apache County* with approval in *NAACP v. New York*, 413 U.S. 345, 369 (1973), which upheld denial of intervention in a § 4 action. The Court reasoned "that there were no unusual circumstances warranting intervention," including no alleged injury, no showing of inadequate representation by the Attorney General, and no impairment of any private right. *Id.* 368. In a § 5 case, private parties cannot assert any "impairment of a right" since they have neither substantive nor procedural "rights" under § 5.

States should not be subjected to the political stratagems of intervenors wearing the mantle of private attorneys general. Expeditious decisions are critical in § 5 actions, especially in redistricting. Final judgments must be rendered prior to the next election, which leaves little time in states like Georgia that have legislative elections every two years. The district court noted that it handled this case "with all possible speed" (J.S.27a), yet it still took eight months to final judgment. *Georgia v. Reno, supra,* went on for five *years* in the district court. The intervenors here expanded the scope of the case from three Senate districts to include the entire Georgia House and congressional plans. They prevented the court from entering a consent decree as to the House and congressional plans, which would otherwise have occurred months before judgment was ultimately entered. In addition to the much greater efficiency of pretrial proceedings that would have resulted from such a consent decree, prompt final judgments would have allowed voters and candidates to know much sooner what the districts would be. Any possibility of settlement discussions regarding the Senate plan were also precluded, as a practical matter, by the intervenors' much broader objections than those of the DOJ. (Tr.76-79, 2/8/02).

The inappropriateness of intervention in this case also follows from Fed. R. Civ. P. 24. There is clearly no "right" to intervene here under Rule 24(a). Section 5 provides no such right and intervenors have no legal "interest" that can be

either "impaired or impeded" by denial of intervention.[12] Neither does permissive intervention lie in a § 5 case because the claims and defenses in the case are defined by the pleadings of plaintiff and the United States. The intervenors' desire to object to all of Georgia's redistricting statutes did not endow them with a "claim or defense" in common with the "main action." That failure should be fatal to intervention under Rule 24, independent of the greater policy and statutory concerns inherent in the very structure of § 5.

The requirement that intervenors have a real "claim or defense" was addressed at length by the concurring opinion of Justice O'Connor in *Diamond v. Charles*, 476 U.S. 54, 74 (1986). In *Diamond*, the district court had permitted a pediatrician to intervene in an action filed by physicians attacking Illinois' abortion law. The State itself acquiesced in the permanent injunction that was affirmed by the Seventh Circuit, but the intervenor sought to appeal to this Court. In a unanimous opinion, this Court dismissed the appeal for want of jurisdiction because the intervenor did not have a sufficient legal interest to permit him to pursue issues acquiesced in by the State. Only the government itself had a sufficient, cognizable interest in defending its statutes. Justice O'Connor's concurrence addressed this issue and the "claim or defense" requirement of Rule 24 at some length:

> The words "claim or defense" manifestly refer to the kinds of claims or defenses that can be raised in courts of law as part of an actual or impending law suit, as is confirmed by Rule 24(c)'s requirement that a person desiring to intervene serve a motion stating "the grounds therefor" and "accompanied by a pleading setting forth the claim or defense for which intervention is sought." Thus, although permissive intervention "plainly dispenses with any requirement that the intervenor shall have a direct personal or pecuniary interest in the subject

[12] See note 11 *supra.*

> of the litigation," *SEC v. United States Realty & Improvement Co.*, 310 U.S. 434, 459 (1940), it plainly *does* require an interest sufficient to support a legal claim or defense which is "founded upon [that] interest" and which satisfies the Rule's commonality requirement. Dr. Diamond simply has no claim or defense in this sense; he asserts no actual, present interest that would permit him to sue or be sued by appellees, or the State of Illinois, or anyone else, in an action sharing common questions of law or fact with those at issue in this litigation. *Id.* 76-77 (O'Connor, J., concurring, joined by Burger, C.J., and Rehnquist, J.).

The same reasoning applies to the intervenors here. They have no legal claim or defense founded upon their political interest in this action. Indeed, the circumstances are far more compelling in a § 5 case than in *Diamond* because of the unique declaratory judgment procedure established by § 5.

CONCLUSION

For the foregoing reasons, the State of Georgia respectfully requests that the Court reverse the April 5, 2002, judgment of the district court and direct that court to enter judgment preclearing the 2001 Senate Plan at issue.

Respectfully submitted,

THURBERT E. BAKER
Attorney General of Georgia
DENNIS R. DUNN
Deputy Attorney General
THOMAS SAMPSON, SR.
THOMAS, KENNEDY, SAMPSON & PATTERSON
Atlanta, Georgia

MARK H. COHEN
TROUTMAN SANDERS LLP
Atlanta, Georgia

DAVID F. WALBERT *
PARKS, CHESIN & WALBERT, P.C.
26th Floor, 75 Fourteenth Street
Atlanta, Georgia 30309
(404) 873-8000

* Counsel of Record

Special Assistant Attorneys General

APR 2 2003

No. 02-182

In the Supreme Court of the United States

STATE OF GEORGIA, APPELLANT

v.

JOHN ASHCROFT, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE FEDERAL APPELLEES

THEODORE B. OLSON
Solicitor General
Counsel of Record

RALPH F. BOYD, JR.
Assistant Attorney General

PAUL D. CLEMENT
Deputy Solicitor General

MALCOLM L. STEWART
Assistant to the Solicitor General

MARK L. GROSS
TOVAH R. CALDERÓN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the district court erred in denying appellant's request for judicial preclearance of its proposed state senate redistricting plan under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c.

2. Whether Section 5, as applied by the district court to the facts of this case, is a permissible exercise of congressional power under the Fifteenth Amendment.

3. Whether private parties may intervene in a declaratory judgment action filed under Section 5.

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BRIEF FOR THE FEDERAL APPELLEES

OPINIONS BELOW

The opinion of the three-judge district court denying preclearance of appellant's state senate redistricting plan, and granting preclearance of appellant's congressional and state house redistricting plans (J.S. App. 23a-213a), is reported at 195 F. Supp. 2d 25. The opinion of the district court granting preclearance of appellant's revised state senate redistricting plan (J.S. App. 1a-22a) is reported at 204 F. Supp. 2d 4.

JURISDICTION

The three-judge district court entered its initial judgment on April 5, 2002. The court entered its judgment granting preclearance of the revised state senate redistricting plan on June 3, 2002. Appellant filed a notice of appeal from both judgments on June 4, 2002, and filed a jurisdictional statement on July 31, 2002.

See 28 U.S.C. 2101(b). This Court noted probable jurisdiction on January 17, 2003. The jurisdiction of this Court rests on 42 U.S.C. 1973c and 28 U.S.C. 1253.

STATEMENT

Appellant, the State of Georgia, instituted this action in the United States District Court for the District of Columbia, requesting a declaratory judgment that its 2001 redistricting plans for seats in the United States Congress, Georgia Senate, and Georgia House of Representatives "do not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color" in violation of Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. J.S. App. 23a. The United States opposed that request with respect to the state senate plan, while four African-American citizens of Georgia were permitted to intervene to challenge the legality of all three plans. *Id.* at 214a-219a. The district court granted appellant's request for a declaratory judgment with respect to the congressional and state house plans, but denied its request for a declaratory judgment with respect to the state senate plan. *Id.* at 28a-29a, 149a-150a.

Appellant subsequently adopted a revised state senate plan and submitted it to the district court. Based on a stipulated record, the court held that the revised plan did not violate Section 5, and it granted appellant's request for a declaratory judgment with respect to that plan. J.S. App. 1a-22a. Appellant has appealed from the district court's initial decision denying a declaratory judgment with respect to the State's original state senate plan.

1. The State of Georgia is a covered jurisdiction subject to Section 5. See 28 C.F.R. Pt. 51, App. Under Section 5, a covered jurisdiction may not implement

changes in any "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting," unless the jurisdiction (1) has obtained judicial preclearance by means of a declaratory judgment from the United States District Court for the District of Columbia that the change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color," or (2) has submitted the proposed change to the Attorney General for administrative preclearance and the Attorney General has not interposed an objection. 42 U.S.C. 1973c. An action for declaratory judgment under Section 5 is heard and determined by a three-judge district court. *Ibid.*; 28 U.S.C. 2284(a). The court may preclear a proposed voting change only if the covered jurisdiction proves that the change will not "lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Reno* v. *Bossier Parish Sch. Bd.*, 520 U.S. 471, 478 (1997) (*Bossier I*) (quoting *Beer* v. *United States*, 425 U.S. 130, 141 (1976)). The jurisdiction's last existing legally enforceable plan is the benchmark against which a proposed voting change will be measured in determining whether the change will have a prohibited retrogressive effect. *Ibid*[1]

[1] Appellant's redistricting following the 1990 census resulted in several years of litigation. This Court found that, in exercising its Section 5 authority at that time, the United States had unlawfully pressured appellant to adopt a districting plan that maximized the number of majority-black districts. See *Miller* v. *Johnson*, 515 U.S. 900 (1995). That case was subsequently resolved when a court-drawn remedial plan was adopted for the congressional district lines, and the parties reached a mediated agreement with respect to the state legislative district lines. Those plans were implemented in 1997 and served as the benchmark in this pre-

2. The United States House of Representatives and the Georgia State Senate and House of Representatives are reapportioned in light of population changes after each decennial census. J.S. App. 37a, 47a. Because appellant is a covered jurisdiction, it must comply with Section 5 before redefining its congressional and state legislative district lines. *Georgia* v. *United States*, 411 U.S. 526, 528 n.1, 534-535 (1973). The 2000 census revealed substantial population growth within the State of Georgia, as well as shifts in the relative populations of different areas within the State. J.S. App. 40a, 55a. As a result, appellant was apportioned two additional seats in the United States House of Representatives, *id.* at 47a, and most of the existing state senate and house districts were malapportioned, *id.* at 55a. In particular, most of the districts in which the black voting age population (BVAP) comprised a majority under the benchmark plans were substantially underpopulated in comparison to the ideal district size. *Id.* at 55a, 72a.

In response to those census results, appellant adopted new congressional and state legislative districting plans. J.S. App. 42a-46a. In formulating those districting plans, Georgia legislative officials avowedly sought to increase the number of seats held by the Democratic Party in the state house and senate. See *id.* at 46a, 113a, 139a. As the district court explained, "Georgia's State House and State Senate reapportionment plans were drafted to bolster support for the Democratic Party, in part by 'unpacking' predominantly African American districts," *id.* at 113a, apparently in

clearance action. See J.S. App. 37a-38a; see also *Abrams* v. *Johnson*, 521 U.S. 74 (1997); *Johnson* v. *Miller*, 929 F. Supp. 1529 (S.D. Ga. 1996).

the belief that dispersion of black voters among a broader range of electoral districts would result in the election of a greater number of Democratic candidates.

Implementation of the three proposed districting plans would have resulted in a reduction of BVAP in a total of 46 districts (one congressional district, 11 state senate districts, and 34 state house districts) that, under the benchmark plans, had majority BVAPs. See Attachment A. In many of those districts, the proposed reduction of BVAP was substantial. For example, the BVAP in proposed state house District 97 was reduced from 74.04% to 53.24%, a difference of 20.80%. J.S. App. 63a. In some districts, the BVAPs were reduced to less than a majority. Proposed state house District 125, for example, was drawn to contain a BVAP of 45.46%, even though the benchmark district had a BVAP of 52.09%. *Id.* at 71a. Finally, in other districts, BVAPs that were significantly more than 50% were reduced to bare majorities. For example, the BVAP in proposed state senate District 15 was reduced from 62.05% to 50.87%. *Id.* at 74a.[2]

The proposed state senate plan in particular would have redrawn "four districts with existing BVAPs of 55.43% to 62.45% such that they would have bare majorities of BVAP, ranging from 50.31% to 50.87%." J.S. App. 113a. Overall, the proposed senate plan reduced the number of BVAP majority districts from 12 to 11, and the number of districts with majority black registered voter populations (BRVPs) from 13 to 8. *Id.* at 73a-74a. Moreover, the BVAPs in Districts 2, 12, and 26 were reduced to bare majorities, and the

[2] The percentages in the text were derived using appellant's method of calculating black population. See note 3, *infra* (describing parties' differing calculation methods).

BRVPs to less than 50%. A comparison of the percentages of BVAP and BRVP in those districts under the benchmark and proposed plans is reflected in the table below:

District	Benchmark BVAP	Proposed BVAP	Benchmark BRVP	Proposed BRVP
2	59.98%	49.81%	62.38%	48.42%
12	54.94%	50.22%	52.48%	47.46%
26	61.93%	50.39%	62.79%	48.27%

Id. at 74a.[3]

[3] The calculations of BVAP set forth in the text are based on the Department of Justice's *Guidance Concerning Redistricting and Retrogression Under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c*, 66 Fed. Reg. 5412 (2001), which counts as black all non-Hispanic individuals who, in the 2000 census, identified themselves only as black, or as black and white, but not persons who identified themselves as black and another minority race. Appellant, however, calculated BVAP by counting all black multi-racial Hispanic and non-Hispanic individuals as black. In determining whether the plan would have an impermissible retrogressive effect, the district court followed the United States' recommendation that it refrain from choosing one measurement over the other. The court instead "consider[ed] *all* the record information, including total black population, black registration numbers and both BVAP numbers." J.S. App. 117a. In any event, the reduction in BVAP in senate Districts 2, 12, and 26 was slightly greater under appellant's method of calculation:

Dist.	Benchmark BVAP (Ga.)	Proposed BVAP (Ga.)	Reduct. (Ga.)	Benchmark BVAP (U.S.)	Proposed BVAP (U.S.)	Reduct. (U.S.)
2	60.58%	50.31%	10.27%	59.98%	49.81%	10.17%
12	55.43%	50.66%	4.77%	54.94%	50.22%	4.72%
26	62.45%	50.80%	11.65%	61.93%	50.39%	11.54%

Id. at 74a, 122a.

The reduction of BVAP and BRVP in Districts 2, 12, and 26 was caused in part by the removal of majority black precincts. J.S. App. 124a-125a. Because those districts were underpopulated in comparison to the ideal district size after the 2000 census, the removal of such precincts was unnecessary in order to comply with constitutional one person-one vote requirements. *Ibid.* The following table shows each proposed district's deviation in population from the ideal district size, as well as a comparison between the percentage of BRVP removed from each district and the percentage of BRVP that was added:

District	Deviation From Ideal District Size	BRVP of Removed Precincts	BRVP of Added Precincts
2	-24.37%	20.39%	14.97%
12	-17.77%	46.64%	30.28%
26	-28.65%	41.80%	20.20%

Id. at 124a-125a n.38. Thus, because the precincts added to proposed Districts 2, 12, and 26 contained significantly lower numbers of black residents than did the precincts that were removed, the overall effect of the plan was to reduce the percentages of BRVP in those districts. *Id.* at 125a.

The government's evidence in this case also indicated that senate Districts 2, 12, and 26 were marked by racially polarized voting. The government's expert prepared a report that analyzed the extent to which black and non-black voters' preferences for specific candidates have differed in recent elections where voters were presented with a choice between black and white candidates. J.S. App. 99a-101a. The statistical evidence, which indicated that white crossover voting was low or minimal, was supported by the opinions of

various community activists who stated that they had observed highly polarized voting patterns and racially charged political campaigns in benchmark Districts 2 and 12. *Id.* at 136a-138a.

3. Appellant did not apply to the Attorney General for administrative preclearance of the new districting plans, but instead instituted an action for declaratory judgment in the district court. J.S. App. 27a. Although the proposed congressional and state house plans effected a reduction of the BVAPs of a total of 35 districts that had majority BVAPs under the benchmark plan (see p. 5, *supra*), the United States did not oppose preclearance of those plans because it concluded that those reductions, in light of other factors, did not significantly reduce black voting strength. See *id.* at 103a. The United States opposed preclearance of the state senate plan, however, on the ground that the plan's changes to the boundaries of Districts 2, 12, and 26 (as compared to the benchmark districting scheme) unnecessarily reduced the ability of black voters to elect candidates of their choice. See *ibid.* Four African-American citizens of Georgia were granted leave to intervene to oppose all three of the districting plans. *Id.* at 28a-29a, 214a-219a.[4] The district court granted appellant's request for a declaratory judgment

[4] A fifth African-American Georgia resident, Michael King, was denied leave to intervene based on his failure to comply with applicable procedural requirements. See J.S. App. 28a-29a, 31a-35a. King appealed to this Court, challenging both the district court's denial of leave to intervene and the court's subsequent disposition of the case on the merits. This Court summarily affirmed. See *King* v. *Georgia*, 123 S. Ct. 868 (2003) (No. 02-425); *King* v. *Georgia*, 123 S. Ct. 962 (2003) (No. 02-125). The four individuals who were granted leave to intervene by the district court did not appeal any of the district court's rulings.

with respect to its congressional and state house plans, but denied appellant's request with respect to its state senate plan. *Id.* at 23a-213a.

a. The district court rejected appellant's contention that the United States' failure to object to the congressional and state house plans was a sufficient basis, in and of itself, for entry of a declaratory judgment with respect to those plans. J.S. App. 103a-106a. The court observed that "[t]he State of Georgia made the strategic decision to institute an action in this court for declaratory judgment and not to seek administrative preclearance from the Department of Justice." *Id.* at 103a. The court found that, notwithstanding the absence of any objection by the United States to Georgia's congressional and state house districting plans, appellant's request for a declaratory judgment "imposes on [the district] court an affirmative duty to inquire whether the plans have the effect or purpose of denying or abridging the right to vote on account of race or color. Furthermore, the State assumes the burden of demonstrating by a preponderance of the evidence that such a declaratory judgment is warranted." *Id.* at 104a. The court also observed that "Georgia has presented no legal authority that would limit the Section 5 inquiry to those districts challenged by the Attorney General as retrogressive." *Id.* at 105a-106a.

b. The district court discussed at length the expert reports and testimony submitted by the parties. The court reviewed the testimony of appellant's expert witness, Dr. David Epstein, who testified that the "point of equal opportunity" for black voters to elect their candidate of choice in a particular district was a BVAP of 44.3% in an open-seat election, and 56.5% if a white incumbent was in office. See J.S. App. 92a-93a.

The court found that Dr. Epstein had provided "no competent, comprehensive information regarding white crossover voting or levels of polarization in individual districts across the State." *Id.* at 133a. The court further found that Dr. Epstein's conclusions were based on a statistical technique that "no court has relied on * * * in reviewing a reapportionment plan," *id.* at 90a, and that Dr. Epstein's retrogression analysis consisted solely of comparing the number of districts under the benchmark and proposed plans that had BVAPs greater than 44.3%, *id.* at 96a-97a. The court observed that Dr. Epstein had "failed even to identify the decreases in BVAP that would occur under the proposed plan, and certainly did not identify corresponding reductions in the electability of African American candidates of choice." *Id.* at 121a.

Dr. Epstein testified that a decrease in a district's BVAP would diminish the likelihood of success for black voters' preferred candidates, and that the extent of such a decrease would vary depending on the level of BVAP under the benchmark. J.S. App. 122a. For example, Dr. Epstein projected that a decrease in BVAP from 50% to 44.3% would result in a 25% decline in the likelihood that black voters' candidate of choice would be elected. *Id.* at 122a-123a. Dr. Epstein's analysis indicated, however, that a similar decrease in BVAP would not have the same effect if the overall BVAPs were higher.[5] *Id.* at 123a. The district court found Dr. Epstein's testimony to be "relevant insofar as it suggests that decreases in BVAP within the ranges proposed in the contested Senate districts may have a significant (if inadequately quantified) negative impact on the likelihood that African American voters will be able to elect their candidates of choice." *Ibid.*

[5] For example, Dr. Epstein testified that in senate District 10, to which the United States did not assert an objection, a decrease in BVAP from 69.72% to 63.42%—a difference of 6.52%—"would reduce only slightly the probability of electing an African American preferred candidate." J.S. App. 123a.

The report prepared by the United States' expert, Dr. Richard Engstrom, "clearly describe[d] racially polarized voting patterns in Senate Districts 2, 12 and 26." J.S. App. 99a. Dr. Engstrom testified that evidence of white crossover voting to support black candidates in statewide elections did not disprove the likelihood of racially polarized voting in local elections, such as for state senate seats, because "the level of crossover voting tends to be considerably higher in these [statewide] elections than in the senate and other elections involving local candidates." *Id.* at 101a-102a; see *id.* at 128a-129a. The district court found that "Engstrom's report presents relevant information, and indicates that Senate elections in the redrawn districts will be marked by high levels of polarized voting. [Appellant] has presented no evidence to suggest otherwise." *Id.* at 130a.

The district court also evaluated the parties' lay testimony. The court found that the testimony of various African-American legislators supporting the proposed plan was "far more probative of a lack of retrogressive purpose than of an absence of retrogressive *effect*."[6]

[6] The court also observed that the United States had "presented extensive evidence of African American Senators' misgivings about the Senate plan." J.S. App. 134a. The court noted that two black legislators had voted against the plan, and that other legislators had supported it partly out of concern "that, should the Democratic Party cease to be in the majority in the State House and State Senate, all existing African American chairs of committees would be lost." *Id.* at 46a.

J.S. App. 135a. The court explained that other community leaders, in testimony offered by the United States, had described racially polarized voting in the contested senate districts (particularly in Districts 2 and 12) and had expressed the fear that reductions in BVAP within those districts as contemplated by the State's proposed plan would diminish the opportunities for black voters to elect candidates of choice. *Id.* at 136a-138a.

The district court also considered evidence of demographic changes within the State of Georgia. The court found that appellant had failed to demonstrate that reduction of BVAP in senate Districts 2, 12, and 26 was necessary in order to ensure districts of essentially equal size as required by the Constitution. J.S. App. 124a-126a. The court observed, *inter alia*, that "the State actually removed some majority African-American precincts from each of these districts, a decision that at least casts doubt on its cries of inevitability." *Id.* at 124a. The court further found that there were alternative, reasonable plans that would have satisfied the constitutional principle of one person-one vote while maintaining minority voting strength in the contested districts. *Id.* at 125a.

c. Based on its assessment of the record evidence, the district court concluded that appellant had failed to prove that its proposed state senate plan would not have the retrogressive effect prohibited by Section 5. The district court explained that, under this Court's precedents, "[p]reclearance must be denied if a proposed change abridges the right to vote relative to the status quo." J.S. App. 106a (internal quotation marks omitted). The court observed:

> Section 5 cases have focused almost exclusively on evaluating whether a proposed change would leave minority voters in a "worse" position than under the existing plan. The [Supreme] Court has clearly held that compliance with Section 5, and avoidance of retrogression, does not require jurisdictions to improve or strengthen the voting power of minorities. Nor does Section 5 require that redistricting plans ensure *victory* for minority preferred candidates. Rather, it is a mandate that the minority's *opportunity* to elect representatives of its choice not be diminished, directly or indirectly, by the State's actions.

Id. at 107a-108a (citations and internal quotation marks omitted).

The district court further explained that its "analysis —while limited to the question of retrogression—is fact-intensive and must carefully scrutinize the context in which the proposed voting changes will occur." J.S. App. 111a. "In particular, the level of racially polarized voting, or the degree to which there is a correlation between the race of a voter and the way in which the voter votes, sheds light on whether a decrease in districts' minority populations will produce an impermissibly retrogressive effect." *Ibid.* (citation and internal quotation marks omitted). Accordingly, "if racially polarized voting persists in an area and its electoral history demonstrates that minority voters' preferences diverge greatly from those of non-minority voters, a decrease in BVAP may translate into a lessening of minority voting strength." *Ibid.* The court found that the analysis offered by appellant's expert had "fail[ed] to account for variations in levels of racial polarization," and that appellant had "presented no other evidence to persuade us that voting in future Senate races in the

contested districts will not be racially polarized." *Id.* at 133a.

The district court rejected appellant's contention that "the retrogression inquiry is limited to determining whether reapportioned districts provide minority voters with an 'equal opportunity' to elect minority candidates." J.S. App. 111a-112a. The court explained:

> The Supreme Court has repeatedly held that, while a Section 2 suit compares the change in voting procedures to an ideal, fair benchmark, Section 5 actions must compare the proposed plan to the existing opportunities to elect candidates of choice. Thus, as already discussed, our analysis must focus, not on the level of BVAP that will ensure a "fair" or "equal" opportunity to elect preferred candidates, but on whether the proposed changes would decrease minority voters' opportunities to elect candidates of choice.

Id. at 119a-120a (citation omitted). Accordingly, the court concluded that appellant's expert testimony "was woefully inadequate" because it "was crafted to predict a 'point of equal opportunity' that has little relevance to the retrogression inquiry mandated by Section 5." *Id.* at 143a; see *id.* at 121a (appellant's expert "made no attempt to address the central issue before the court: whether the State's proposal is retrogressive").

Based on its application of the foregoing legal standards, and on "a searching review of the record," J.S. App. 142a, the district court concluded that "the State ha[d] failed to demonstrate by a preponderance of the evidence that the reapportionment plan for the State Senate will not have a retrogressive effect," *id.* at 144a. The court explained:

> The plan proposes to decrease the BVAPs in [senate Districts 2, 12, and 26] such that they would constitute only bare majorities, or slightly less than majorities. It was Georgia's burden to produce some evidence to prove that these changes would not be retrogressive.
>
> The State has produced no evidence to demonstrate that the demographics of the proposed Senate Districts counteract any reduction in BVAP. It has not attempted to show the number of white voters who cross over to vote for African American candidates of choice in the disputed districts and how that might affect the effective exercise of minority voters' franchise. Nor has the State presented evidence regarding potential gains in minority voting strength in Senate Districts other than Districts 2, 12 and 26.

Id. at 144a-145a. Emphasizing that it was "limited to reviewing the evidence presented by the parties," the district court was "unable to conclude that the Senate reapportionment plan will not have a retrogressive effect on the voting strength of Georgia's African American electorate." *Id.* at 145a.

The district court found, however, that appellant had carried its burden of proving that the State's congressional and state house districting plans (which were challenged only by the intervenors) would not have a retrogressive effect. J.S. App. 145a-147a. Although the congressional districting plan effected a 6.81% decrease (from 58.85% to 52.04%) in the majority-BVAP Fifth District (see Attachment A), the court was "not persuaded that the reduction in the African American population in the Fifth District necessarily constitutes retrogression." *Id.* at 146a. With respect to the state

house districting plan, the court explained that "[t]he proposed plan would have 38 or 39 seats in districts with majorities of BVAP. While some of the existing House districts would experience decreases in BVAP under the proposed plan, there is no evidence before the court of racially polarized voting in any House Districts that might suggest that these decreases will have a retrogressive effect." *Id.* at 147a.

d. Judge Oberdorfer filed an opinion concurring in part and dissenting in part. J.S. App. 161a-212a. Judge Oberdorfer "agree[d] that Georgia ha[d] met its burden of proving, by a preponderance of the evidence, that the proposed Congressional and state House redistricting plans have neither a retrogressive purpose nor effect." *Id.* at 161a. Judge Oberdorfer would have held, however, that appellant had also carried its burden with respect to the state senate plan. *Id.* at 165a-212a.

e. Six days after the district court ruled, appellant adopted a revised state senate plan. J.S. App. 2a. Although the revised plan also proposed to reduce the BVAPs in each of the contested districts from the levels in the benchmark plan, the United States advised the court that it would not object. The intervenors, however, opposed the revised plan. *Id.* at 2a-3a.[7]

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[7] A comparison of the benchmark, proposed, and revised plans is reflected in the following table, which uses appellant's method of calculating BVAP:

Dist.	Benchmark BVAP	Proposed BVAP	Revised BVAP	Benchmark BRVP	Proposed BRVP	Revised BRVP
2	60.58%	50.31%	54.50%	62.38%	48.50%	55.80%
12	55.43%	50.66%	55.04%	52.48%	47.76%	51.58%
26	62.51%	50.80%	55.45%	62.93%	48.68%	54.70%

J.S. App. 5a.

Based on a stipulated record, the district court granted appellant's request for a declaratory judgment with respect to its revised state senate plan. J.S. App. 4a, 21a. The court explained that "[t]he likelihood that retrogression will result from the [revised] plan is significantly less where the demographics of the districts with evidence of racially polarized voting are changed to include higher percentages of BVAP." *Id.* at 14a. Thus, although the district court was "faced with the same evidence of racially polarized voting that it considered in reviewing the 2001 Senate plan," *ibid.*, the court "f[ou]nd that it is more probable than not that the 2002 plan will not have a retrogressive effect on African American voting strength in the State of Georgia," *id.* at 20a.

SUMMARY OF ARGUMENT

I. The district court's decision denying preclearance of the State's proposed senate districting plan rests on a straightforward application of established Section 5 principles. Unlike Section 2 of the Voting Rights Act, Section 5 applies only to jurisdictions with a particular history of racial discrimination in voting and only to *changes* in such a jurisdiction's electoral practices. The Section 5 inquiry focuses on the presence or absence of "retrogression"—*i.e.*, on whether a proposed voting change has the purpose or likely effect of rendering minority voters less able to elect candidates of choice than they are under the jurisdiction's pre-existing voting practices. A covered jurisdiction that seeks judicial preclearance of a change in its voting practices bears the burden of proving that the proposed change has neither an impermissible retrogressive purpose nor a retrogressive effect on minority electoral power.

In conducting its Section 5 inquiry, the district court correctly rejected appellant's contention that its proposed senate districting plan could be precleared simply upon a showing that it gave black voters a "fair" or "reasonable" opportunity to elect their candidates of choice. Because the retrogression inquiry under Section 5 turns solely on a comparison between a proposed voting practice and the jurisdiction's existing electoral scheme, proof that the proposed practice is sufficiently fair and reasonable to satisfy Section 2 in the abstract is not an adequate basis for preclearance under Section 5. This Court has specifically rejected efforts to equate the two standards.

Contrary to appellant's contention, the district court did not construe Section 5 as inflexibly requiring the maintenance of pre-existing black super-majority districts. The court expressly recognized that majority-black districts do not inherently increase or decrease black voting strength, and that assessing the effect of a proposed dispersal of black voters requires consideration of all the attendant facts and circumstances. In concluding that the State had failed to carry its burden of persuasion under Section 5, the district court considered the reductions of BVAP in proposed senate Districts 2, 12, and 26, in light of other pertinent factors. The court placed particular emphasis on evidence of racially polarized voting in those senate districts. The court specifically recognized that the State might have been able to obtain preclearance if it had proved that anticipated losses of black electoral power in Districts 2, 12, and 26 would likely be offset by commensurate gains in other senate districts. The district court's refusal to preclear the proposed senate districting plan was based on the State's failures of proof, not on the court's imposition of any categorical

barrier to the elimination or reduction of majority-black districts. The district court's other rulings in this case, which granted preclearance of appellant's congressional, state house, and revised senate districting plans, further refute the State's characterization of the court's decision.

II. As applied by the district court in this case, Section 5 is a permissible exercise of congressional power under the Fifteenth Amendment. Appellant's constitutional challenge rests largely on its erroneous view that the district court categorically required the use of majority-black districts. This Court has specifically sustained the constitutionality of Section 5, both on its face and as applied to voting changes that are adopted for non-discriminatory purposes but are likely to have discriminatory effects. Congress may properly act under the Fifteenth Amendment to prohibit jurisdictions with a history of racial discrimination in voting from adopting new voting practices that would further erode minority electoral strength.

III. The question whether the district court acted properly in allowing individual Georgia voters to intervene in the State's judicial preclearance action is moot, since the court's judgment would be unaffected even if that interlocutory intervention ruling were held to be erroneous. In any event, appellant's challenge to the district court's intervention ruling lacks merit. Actions for declaratory judgment filed in district court are governed by the Federal Rules of Civil Procedure, which include provisions specifically addressing intervention. Because neither the text nor the history of Section 5 suggests that Congress intended to depart from the usual rules governing intervention, the district court acted properly in granting the individual voters' intervention request.

ARGUMENT

I. THE DISTRICT COURT PROPERLY DENIED APPELLANT'S REQUEST FOR JUDICIAL PRECLEARANCE OF ITS PROPOSED STATE SENATE REDISTRICTING PLAN UNDER SECTION 5 OF THE VOTING RIGHTS ACT OF 1965

The district court in this case broke no new ground, but simply engaged in a straightforward application of established Section 5 standards to a detailed factual record. The court correctly recognized that Section 5 analysis turns on a comparison between a covered jurisdiction's proposed voting change and the jurisdiction's existing practices. Under that approach, a voting change is impermissible if it reduces the ability of minority voters to elect their candidates of choice, whether or not the proposed new practice is otherwise unfair or unreasonable. And, contrary to appellant's contention, the district court imposed no categorical bar to the elimination or reduction of existing black supermajority districts. Rather, the court held, based on all the relevant circumstances, that proposed reductions in the BVAPs of three specific state senate districts were likely to diminish the ability of black voters within those districts to elect candidates of choice. The court further held that appellant had failed to produce evidence that the anticipated losses of black electoral power within those three districts would likely be offset by commensurate gains in other parts of the State. Appellant offers no cogent basis for rejecting the court's considered assessment of the evidentiary record.

A. Section 5 Of The Voting Rights Act Imposes Duties Upon Covered Jurisdictions That Are Separate And Distinct From Those Imposed By Section 2

Congress enacted the Voting Rights Act of 1965 "to rid the country of racial discrimination in voting." *South Carolina* v. *Katzenbach*, 383 U.S. 301, 315 (1966). Although Sections 2 and 5 of the Act are "[t]wo of the weapons in the Federal Government's formidable arsenal," this Court has "consistently understood these sections to combat different evils and, accordingly, to impose very different duties upon the States." *Reno* v. *Bossier Parish Sch. Bd.*, 520 U.S. 471, 477 (1997) (*Bossier I*). It is thus well settled that Sections 2 and 5 "differ in structure, purpose, and application." *Holder* v. *Hall*, 512 U.S. 874, 883 (1994).

Section 2 of the Voting Rights Act is not limited to particular jurisdictions, but rather bars *all* States and their political subdivisions from maintaining any "voting qualification or prerequisite to voting or standard, practice, or procedure" that "results in a denial or abridgement of the right * * * to vote on account of race or color." 42 U.S.C. 1973(a). The pertinent inquiry in a Section 2 case is "whether, as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice." *Thornburg* v. *Gingles*, 478 U.S. 30, 44 (1986) (citations and internal quotation marks omitted). The plaintiff in a Section 2 case need not demonstrate that the challenged voting practice reflects a change in the relevant jurisdiction's practice, or that it deprives minority voters within the jurisdiction of electoral strength that they possessed at some prior time. Rather, in Section 2 proceedings "the comparison must be made with a hypothetical alternative: If the *status quo* results in an

abridgement of the right to vote or abridges the right to vote relative to what the right to vote *ought to be*, the status quo itself must be changed." *Reno* v. *Bossier Parish Sch. Bd.*, 528 U.S. 320, 334 (2000) (*Bossier II*).

In contrast to Section 2, Section 5 does not apply nationwide but rather is "aimed at areas where voting discrimination has been most flagrant," *Katzenbach*, 383 U.S. at 315, and it is triggered only by *changes* in a covered jurisdiction's voting practices. The jurisdictions covered by Section 5, including the State of Georgia, were initially identified based on the presence of certain factors, such as the use of literacy tests and low electoral participation, evincing "widespread and persistent discrimination in voting." *Id.* at 331. As originally enacted, Section 5 provided for termination of a jurisdiction's coverage within five years after enactment if "the danger of substantial voting discrimination ha[d] not materialized." *Ibid.* After careful review of the subsequent conduct of covered jurisdictions, however, Congress has found it necessary to extend the temporal scope of Section 5 on three occasions, most recently in 1982. See S. Rep. No. 417, 97th Cong., 2d Sess. 7-10 (1982). The Senate Report accompanying the 1982 legislation explained that "the pre clearance remedy is still vital to protecting voting rights in the covered jurisdictions and that its enforcement should be strengthened." *Id.* at 14. That conclusion was supported in part by the fact that many jurisdictions, including the State of Georgia and its political subdivisions, had failed to comply with Section 5's substantive and procedural requirements, especially in redistricting. *Id.* at 12-14. Congress therefore extended the application of Section 5 for an additional 25 years, until June 29, 2007. See 42 U.S.C. 1973b(a)(8); 42 U.S.C. 1973b note.

"[T]he purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer* v. *United States*, 425 U.S. 130, 141 (1976). As the pertinent Justice Department regulation explains, "[a] change affecting voting is considered to have a discriminatory effect under section 5 if it will lead to a retrogression in the position of members of a racial or language minority group (i.e., will make members of such a group worse off than they had been before the change) with respect to their opportunity to exercise the electoral franchise effectively." 28 C.F.R. 51.54(a). The pertinent inquiry under Section 5 therefore is "whether the ability of minority groups to participate in the political process and to elect their choices to office is augmented, diminished, or not affected by the change." H.R. Rep. No. 196, 94th Cong., 1st Sess. 60 (1975) (quoted in *Beer*, 425 U.S. at 141).

In enacting Section 5, Congress sought "to shift the advantage of time and inertia from the perpetrators of the evil to its victim, by freezing election procedures in the covered areas unless the changes can be shown to be nondiscriminatory." *Beer*, 425 U.S. at 140 (internal quotation marks citations omitted); accord *Bush* v. *Vera*, 517 U.S. 952, 983 (1996) (Section 5 mandates that "the minority's *opportunity* to elect representatives of its choice not be diminished"). Whereas Section 2 requires that a challenged voting practice be compared "with a hypothetical alternative," *Bossier II*, 528 U.S. at 334, a preclearance action under Section 5 "requires a comparison of a jurisdiction's new voting plan with its existing plan," *Bossier I*, 520 U.S. at 478. Thus, "[i]n § 5 preclearance proceedings—which uniquely deal only

and specifically with *changes* in voting procedures—the baseline is the status quo that is proposed to be changed: If the change 'abridges the right to vote' relative to the status quo, preclearance is denied." *Bossier II*, 528 U.S. at 334; see *id.* at 335 ("[I]n vote-dilution cases § 5 prevents nothing but backsliding."); *Holder*, 512 U.S. at 883 (under Section 5, "the proposed voting practice is measured against the existing voting practice to determine whether retrogression would result from the proposed change.").

In short, neither Section 2 nor Section 5 is a "lesser included" version of the other: each prohibits some voting practices that the other does not. Section 2 is not limited to identified jurisdictions with a history of racial discrimination in voting, and a Section 2 violation may be established without proof that the challenged practice represents a change in the law of the pertinent State or locality. Conversely, with respect to covered jurisdictions, "retrogression" has always been understood to constitute a violation of Section 5, whether or not the new practice would also "abridge" the right to vote within the meaning of Section 2. Cf. *Bossier II*, 528 U.S. at 334 ("[The Court's] reading of 'abridging' as referring only to retrogression in § 5, but to discrimination more generally in § 2 and the Fifteenth Amendment, is faithful to the differing contexts in which the term is used.").[8]

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[8] As the district court in this case explained,

> [e]vidence that a plan satisfies Section 2 by preserving reasonably good opportunities for African American voters to elect candidates of choice may bear on whether there has been impermissible retrogression under Section 5. Undoubtedly, a change that has this effect is less likely to be marked by retrogressive intent. Yet, if existing opportunities of minority voters to exercise their franchise are robust, a proposed plan that leaves those voters with merely a "reasonable" or "fair" chance of electing a candidate of choice may constitute retrogression in overall minority voting strength.

J.S. App. 113a.

Section 2 and Section 5 differ in another significant respect as well. In a Section 2 case, the burden is on the plaintiff to prove unlawful discrimination. See *Bossier I*, 520 U.S. at 479-480. By contrast, a covered jurisdiction that seeks judicial preclearance of a change in its voting practices "bears the burden of proving" that the proposed change has neither an impermissible retrogressive purpose nor a retrogressive effect on minority electoral strength. *Id.* at 478; see *id.* at 480 (Section 5 "imposes upon a covered jurisdiction the difficult burden of proving the *absence* of discriminatory purpose and effect."); *Bossier II*, 528 U.S. at 332 ("In the specific context of § 5, * * * the covered jurisdiction has the burden of persuasion."); J.S. App. 26a ("[I]n a Section 5 case, * * * the burden is on the State to show that the redistricting plan will not adversely affect the opportunities of African American voters to effectively exercise their electoral franchise.").

B. The District Court's Determination That Appellant Had Failed To Prove The Absence Of An Impermissible Retrogressive Effect In This Case Was Consistent With This Court's Precedents

1. The District Court Properly Focused Its Inquiry On A Comparison Between The State's Proposed Senate Districting Plan And The Benchmark Plan

a. Appellant contends (Br. 30-31) that it was entitled to preclearance of its original senate districting plan

because each of the three districts contested by the United States "presented minority voters and candidates with at least an equal chance to win and a full, fair opportunity to participate in the political process." That claim lacks merit. The "retrogression" inquiry under Section 5 requires a comparison between the proposed voting practice for which preclearance is sought and the pre-existing voting regime or benchmark of the covered jurisdiction. And "the purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer*, 425 U.S. at 141. Evidence demonstrating that black voters within a proposed district would have a "fair" or "reasonable" opportunity to elect their candidate of choice, while potentially *relevant* to the Section 5 inquiry, does not by itself establish the absence of retrogression. As the district court correctly recognized, "if existing opportunities of minority voters to exercise their franchise are robust, a proposed plan that leaves those voters with merely a 'reasonable' or 'fair' chance of electing a candidate of choice may constitute retrogression in overall minority voting strength." J.S. App. 113a.

In both *Bossier I* and *Bossier II*, this Court specifically declined "to blur the distinction between § 2 and § 5 by shifting the focus of § 5 from nonretrogression to vote dilution, and changing the § 5 benchmark from a jurisdiction's existing plan to a hypothetical, undiluted plan." *Bossier II*, 528 U.S. at 336 (brackets, ellipsis, and internal quotation marks omitted); see *Bossier I*, 520 U.S. at 480. In *Bossier I*, the United States argued that preclearance of a proposed redistricting plan could properly be denied on the ground that the proposed

plan violated Section 2 by unnecessarily limiting the opportunity of minority voters to elect their candidates of choice. See *id.* at 475-476. This Court rejected that contention, explaining that to

> recogniz[e] § 2 violations as a basis for denying § 5 preclearance would inevitably make compliance with § 5 contingent upon compliance with § 2. Doing so would, for all intents and purposes, replace the standards for § 5 with those for § 2. Because this would contradict our longstanding interpretation of these two sections of the Act, we reject [the United States'] position.

Id. at 477. In *Bossier II*, the Court similarly held that the Attorney General could not properly refuse to preclear "a voting change with a discriminatory but nonretrogressive purpose." 528 U.S. at 336; see *id.* at 328-341.

The Court's analysis in *Bossier I* and *Bossier II* compels rejection of appellant's argument that a covered jurisdiction's *compliance* with Section 2 suffices for preclearance under Section 5. To obtain judicial preclearance under Section 5, a covered jurisdiction must prove that a proposed voting change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. 1973c. As the Court in *Bossier II* recognized, the question whether a particular practice "abridges" the right to vote cannot cogently be addressed "without some baseline with which to compare the practice." 528 U.S. at 334. Because the "baseline" in a Section 5 case "is the status quo that is proposed to be changed," any change that materially reduces the electoral power of minority voters "abridges the right to vote" within the meaning of Section 5, regardless of any comparison that

might be made to some "hypothetical alternative." *Ibid.* To permit preclearance of such a change based on the general "fairness" or "reasonableness" of the proposed voting practice "would, for all intents and purposes, replace the standards for § 5 with those for § 2." *Bossier I*, 520 U.S. at 477. This Court's adoption of such an approach would "call into question more than 20 years of precedent interpreting § 5." *Id.* at 480.

b. Appellant's reliance (Br. 35) on *City of Richmond* v. *United States*, 422 U.S. 358 (1975), is misplaced. *City of Richmond* involved a request for preclearance of a proposed annexation that would have reduced the black population of the city from 52% to 42%. *Id.* at 363. This Court concluded that, although the annexation may have had the effect of creating a political unit with a lower percentage of blacks, it did not violate Section 5 so long as it fairly reflected the strength of the black community after annexation. *Id.* at 371. That holding, however, was "nothing more than an *ex necessitate* limitation upon the effect prong in the particular context of annexation—to avoid the invalidation of all annexations of areas with a lower proportion of minority voters than the annexing unit." *Bossier II*, 528 U.S. at 330-331. While the Court in *City of Richmond* "found it necessary to make an exception to normal retrogressive-*effect* principles" in the context of annexation, *id.* at 331, it in no way equated the Section 2 and Section 5 inquiries, nor did it eliminate the retrogressive-effect test in Section 5 cases generally. Because this case does not involve an annexation, *City of Richmond* is inapposite. See *id.* at 330 ("[*City of Richmond*'s] interpretation of the effect prong of § 5

was justified by the peculiar circumstances presented in annexation cases.").[9]

2. The District Court Did Not Construe Section 5 As Inflexibly Requiring The Maintenance Of Pre-Existing Majority BVAP Districts

Appellant characterizes the district court's opinion as imposing an inflexible rule that, once a jurisdiction covered by Section 5 has created a BVAP majority or super-majority district, the district's black population cannot under any circumstances be dispersed to adjoining districts. See Appellant Br. 39 ("According to the district court, once a seat thus becomes safe through demographic changes, it must be kept safe forever."). Appellant further contends that under the district court's analysis, "covered states like Georgia would ultimately be compelled to have the maximum possible number of supermajority, safe districts" (*ibid.*), notwithstanding "the unavoidable fact that supermajorities necessarily diminish African American voter

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[9] Appellant's reliance (Br. 35) on *United States* v. *Mississippi*, 444 U.S. 1050 (1980), is also misplaced. In that case, a three-judge district court found that slight differences in the number of districts with-majority BVAPs in the benchmark and proposed plans were "insubstantial," and that the proposed plan therefore was "not retrogressive in overall black voting strength." *Mississippi* v. *United States*, 490 F. Supp. 569, 580 (D.D.C. 1979). The court cited *City of Richmond*, along with a number of other cases, for the limited proposition that "no racial group has a constitutional or statutory right to an apportionment structure designed to maximize its political strength." *Id.* at 582. But that proposition is a recognized principle under Section 5 and was properly applied to appellant's proposed state senate plan by the district court in this case. See J.S. App. 107a ("The [Supreme] Court has clearly held that compliance with Section 5, and avoidance of retrogression, does not require jurisdictions to improve or strengthen the voting power of minorities.").

influence in other districts" (*id.* at 36). Appellant's argument reflects a fundamental misunderstanding of the district court's opinion.

Contrary to the State's contention, the district court took pains to emphasize that it was *not* adopting a categorical prohibition on the alteration or elimination of existing BVAP majority districts. "In evaluating the evidence of the Senate redistricting plan's purpose and effect, the court consider[ed] a wide range of factors that contribute to minority voting strength." J.S. App. 118a. Although the district court attached substantial weight to the fact that the Senate districting plan "propose[d] to decrease the BVAPs in existing majority-minority districts such that they would constitute only bare majorities, or slightly less than majorities," *id.* at 145a, it did not suggest that such decreases, standing alone, were dispositive of appellant's preclearance request. Rather, the court observed that "[i]t was Georgia's burden to produce some evidence to prove that these changes would not be retrogressive," and it concluded (after exhaustive analysis of the pertinent record evidence) that "the State ha[d] not met its burden." *Ibid.* Appellant offers no cogent basis for rejecting the district court's assessment of the evidentiary record.

a. The district court observed at the outset of its retrogression analysis that "Section 5 is not an absolute mandate for maintenance of [majority-minority] districts." J.S. App. 108a. The court explained that

> majority-minority districts do not inherently increase or decrease minority voting strength, but rather can have either effect or neither. Breaking apart a majority-minority district and dispersing minority voters into neighboring districts can have different consequences in different contexts. On the one hand, it can diminish minority voters' power by fragmenting them among several districts where a bloc-voting majority can routinely outvote them. On the other hand, such dispersal can actually increase electoral opportunity if it eliminates "packing" whereby the minority voters are crammed into a small number of "safe" districts and deprived of an ability to influence a greater number of elections.

Id. at 109a (citations, brackets, and internal quotation marks omitted). For that reason, the court explained, its Section 5 "analysis—while limited to the question of retrogression—is fact-intensive and must carefully scrutinize the context in which the proposed voting changes will occur." *Id.* at 111a.[10]

b. In concluding that appellant had failed to carry its burden of persuasion under Section 5, the district court considered the reductions of BVAP in proposed senate Districts 2, 12, and 26, in light of other factors bearing on black voters' effective exercise of the franchise and their ability to elect candidates of choice. Consistent with this Court's decision in *Thornburg*, 478 U.S. at 55-57, and with applicable Department of Justice regulations and published guidance, see 28 C.F.R. 51.58(b)(3); *Guidance Concerning Redistricting and Retrogression*

[10] Consistent with that aspect of the district court's analysis, applicable Department of Justice regulations provide that, in determining whether a covered jurisdiction's proposed redistricting plan has a retrogressive purpose or effect, the Attorney General will consider both "[t]he extent to which minority concentrations are fragmented among different districts" and "[t]he extent to which minorities are overconcentrated in one or more districts." 28 C.F.R. 51.59(c) and (d); accord *Guidance Concerning Redistricting and Retrogression Under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c*, 66 Fed. Reg. 5412, 5413 (2001).

Under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, 66 Fed. Reg. 5412, 5413 (2001) (*DOJ Guidance*), the district court placed particular emphasis on evidence concerning the presence or absence of racially polarized voting in the senate districts contested by the United States. See, *e.g.*, J.S. App. 114a, 115a, 126a-127a. The court reviewed the record and concluded that "[t]he United States ha[d] produced credible evidence that suggests the existence of highly racially polarized voting in the proposed districts." *Id.* at 133a. The court further explained that the State had "provided the court with no competent, comprehensive information regarding white crossover voting or levels of polarization in individual districts across the State," and had "presented no other evidence to persuade [the court] that voting in future Senate races in the contested districts will not be racially polarized." *Ibid.*[11]

c. Based on the evidence described above, the district court found that appellant had failed to prove "by a preponderance of the evidence that the planned reductions in BVAP and in the number of African American registered voters in Senate Districts 2, 12 and 26 will not diminish African American voting strength in these districts." J.S. App. 133a. But the court did not hold that the likelihood of reduced black electoral power in those three districts was dispositive of the Section 5 inquiry. Rather, the court left open the

[11] In its subsequent opinion granting preclearance of Georgia's revised senate districting plan (see J.S. App. 1a-22a; pp. 16-17, *supra*), the district court summarized its earlier decision denying preclearance of the 2001 plan by stating: "The evidence of racially polarized voting in [Districts 2, 12, and 26], in conjunction with the bare majorities of BVAP in the proposed districts, led the court to conclude that the 2001 plan was more likely than not to have a retrogressive effect." *Id.* at 19a.

possibility that, even when the dispersion of minority residents can be expected to diminish the electoral power of minority voters within a particular district, a covered jurisdiction might still be able to prove that the proposed change is non-retrogressive because it will *increase* the ability of minority voters to elect candidates of choice in *other* districts within the jurisdiction. The district court found that appellant could not obtain preclearance of its original senate districting plan on that basis, however, because the State had failed to present evidence of likely gains in black electoral power in districts other than 2, 12, and 26. Thus, the court stated: "[I]t may well be the case that any decrease in African American electoral power in Senate Districts 2, 12 and 26 will be offset by gains in other districts, but [Georgia] has failed to present any such evidence." *Id.* at 133a-134a; see *id.* at 145a (noting that the State did not "present[] evidence regarding potential gains in minority voting strength in Senate Districts other than Districts 2, 12 and 26").

There is consequently no basis for appellant's assertion (Br. 36-37) that, under the district court's analysis, a covered jurisdiction must maintain pre-existing black super-majority districts even if overall black electoral power would be increased by dispersion of black voters. In fact, the district court expressly contemplated the possibility that a covered jurisdiction could obtain preclearance of a new districting plan by showing that anticipated losses of black electoral power in some districts would likely be offset by commensurate gains in others. See pp. 32-33, *supra*; cf. *DOJ Guidance*, 66 Fed. Reg. at 5413 (when Justice Department considers an administrative preclearance request for a proposed redistricting plan, all relevant "information is used to compare minority voting strength in the benchmark

plan as a whole with minority voting strength in the proposed plan as a whole."). The district court faulted appellant for a failure of proof, not a simple failure to maintain existing BVAP-majority districts. While recognizing that a new districting plan might sometimes increase overall black electoral strength even while reducing black voting power in particular areas, the court held that appellant, which bears the burden of proof in this Section 5 proceeding (see p. 25, *supra*), had failed to show a likelihood that its own proposed senate districting plan would have that effect.

For essentially the same reason, there is no merit to appellant's contention (Br. 36-37) that the district court under Section 5 has required conduct—*i.e.*, the continued use of black super-majority legislative districts—that is potentially violative of Section 2 under a "vote packing" theory. See *Johnson* v. *DeGrandy*, 512 U.S. 997, 1007 (1994) ("manipulation of district lines can dilute the voting strength of politically cohesive minority group members" by, *inter alia*, "packing them into one or a small number of districts to minimize their influence in the districts next door"); *Thornburg*, 478 U.S. at 46 n.11; pp. 30-31, *supra*. Vote dilution prohibited by Section 2 occurs only when a challenged districting plan "impairs the ability of a protected class to elect its candidate of choice on an equal basis with other voters," *Johnson*, 512 U.S. at 1007 (citation omitted); and a claim that black voting strength has been "impair[ed]" through "packing" necessarily requires proof that overall black electoral power would be *greater* if black voters were more evenly dispersed among different legislative districts. In situations where the elimination or reduction of existing majority-black districts could be expected to have that *ameliorative* effect, such a change would not be retrogressive, and Section 5 would impose no barrier to its adoption.

In the present case, the district court expressly contemplated the possibility that a covered jurisdiction's elimination or reduction of pre-existing majority-black districts could be held non-retrogressive based on proof that the dispersion of black voters would increase black electoral strength in other districts. See pp. 32-33, *supra*. If appellant had shown that the reduction of high BVAPs in some districts (and the consequent dispersion of black voters to other districts) would increase rather than diminish black electoral strength statewide, there is no reason to doubt that the district court would have granted preclearance of the original proposed senate districting plan. There is consequently no ground for concern that the district court's Section 5 analysis would prevent a covered jurisdiction from eliminating overconcentrations of black voters in any situation where that might be necessary to ensure compliance with Section 2.[12]

d. The district court's other rulings in this case further belie appellant's contention that the court's refusal to preclear the original senate districting plan was based on an inflexible requirement that the State maintain existing black majority and super-majority

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[12] There is, in particular, no basis for appellant's suggestion (Br. 36-37) that the changes made to the state senate districting plan in response to the district court's initial denial of preclearance have rendered Georgia vulnerable to a colorable "vote packing" claim under Section 2. Under the revised senate districting plan, the BVAPs of Districts 2, 12, and 26 were 54.5%, 55.04%, and 55.45%, respectively. J.S. App. 14a. Appellant cites no precedent, and we are aware of none, suggesting that majority-black districts of that comparatively small magnitude can give rise to a tenable vote packing claim.

districts. In its initial decision, the court granted the State's request for a declaratory judgment with respect to the proposed congressional and state house districting plans, see J.S. App. 145a-147a, notwithstanding the fact that the plans resulted in a reduction of BVAP in one congressional and 34 state house districts that had majority BVAPs under the benchmark plan, see p. 5, *supra*. The court's grant of declaratory relief with respect to the congressional and state house plans was consistent with the position of the United States, which did not oppose preclearance of those plans (though the private intervenors did oppose preclearance).[13] With respect to the congressional plan, the court was "not persuaded that the reduction in the African American population in the Fifth District necessarily constitutes retrogression." *Id.* at 146a. With respect to the state house plan, the court explained that "[w]hile some of the existing House districts would experience

[13] Appellant suggests (Br. 30) that the United States' approach in this case represents a continuation of the practice, declared unlawful by this Court in *Miller* v. *Johnson*, 515 U.S. 900, 927-928 (1995), of pressuring covered jurisdictions to maximize the number of majority-black districts. See note 1, *supra*. In this case, however, neither the United States nor the district court required appellant to create additional majority-black districts. Instead, the United States' position and the court's holding were properly premised upon the *Beer* retrogression standard. Thus, their focus was on preventing the diminution—not on achieving the maximization—of minority voting strength. See, *e.g.*, *Vera*, 517 U.S. at 983 ("Nonretrogression * * * mandates that the minority's *opportunity* to elect representatives of its choice not be diminished, directly or indirectly, by the State's actions."). And appellant does not contest the district court's conclusion (J.S. App. 37a-38a; see note 1, *supra*) that the prior court-ordered remedial districting plan furnished the appropriate benchmark for the court's retrogression analysis in this case.

decreases in BVAP under the proposed plan, there is no evidence before the court of racially polarized voting in any House Districts that might suggest that these decreases will have a retrogressive effect." *Id.* at 147a. In preclearing those plans, the court unequivocally rejected any mode of analysis that would categorically require the maintenance of all black majority and super-majority legislative districts.

The same is true of the district court's subsequent decision (see J.S. App. 1a-22a) that granted preclearance of the State's revised senate districting plan, notwithstanding reductions in the BVAPs of some BVAP-majority districts. Appellant submitted its revised plan in April 2002, six days after the district court denied preclearance of the original (2001) proposed senate plan. The United States did not oppose preclearance of the revised plan; the private intervenors opposed preclearance. See *id.* at 3a. The court observed, with respect to the revised plan, that "[w]hile there are thirteen districts with majority BVAP according to the State's calculations of BVAP, the BVAPs in eight of these proposed districts would decrease as compared with the benchmark plan." *Id.* at 13a. The court nevertheless found it "more probable than not that the 2002 plan will not have a retrogressive effect on African American voting strength in the State of Georgia," *id.* at 20a, and it accordingly granted appellant's request for a declaratory judgment preclearing the plan, *id.* at 21a.

In granting preclearance of the revised senate districting plan, the district court explained that "[t]he only evidence of racially polarized voting before the court is in Senate Districts 2, 12 and 26," and that "[u]nder the revised Senate redistricting plan, the BVAP in Senate District 12 would remain practically

the same" as under the benchmark plan. J.S. App. 14a. Although the BVAPs in Districts 2 and 26 were approximately 6% lower under the revised plan than under the benchmark plan, see *ibid.*, the court noted that "[t]he revised plan addresses district residents' concerns about particular precincts, the inclusion or exclusion of which the residents testified would negatively affect minority voting strength," *id.* at 20a. The revised plan also offered the possibility of offsetting gains in other districts that the court found absent in the original plan. Thus, the district court found it significant that "according to [appellant's] methodology of calculating BVAP, the 2002 plan has thirteen districts with majority BVAP, where the benchmark plan only has twelve." *Id.* at 19a. The district court's nuanced consideration of all the relevant evidence in preclearing the State's 2002 senate districting plan further refutes appellant's contention that the court's prior opinion categorically required the maintenance of existing black majority or super-majority districts.

II. AS APPLIED BY THE DISTRICT COURT TO THE FACTS OF THIS CASE, SECTION 5 IS A PERMISSIBLE EXERCISE OF CONGRESSIONAL POWER UNDER THE FIFTEENTH AMENDMENT

Appellant contends (Br. 37-39) that Section 5, as applied by the district court to Georgia's preclearance request in this case, exceeds Congress's enforcement authority under the Fifteenth Amendment. That claim lacks merit.

A. Like its statutory challenge to the district court's ruling, appellant's constitutional argument is premised on a clear overreading of that court's decision. As explained above, the district court did not "require that states draw safe minority districts" (Appellant Br. 38)

or hold that "once a seat thus becomes safe through demographic changes, it must be kept safe forever" (*id.* at 39). Whatever the constitutional status of a hypothetical federal law that imposed such requirements, Section 5 as correctly applied by the district court here did not have those effects and so suffers no constitutional defect.

B. This Court has "specifically upheld the constitutionality of § 5 of the [Voting Rights] Act against a challenge that this provision usurps powers reserved to the States." *Lopez* v. *Monterey County*, 525 U.S. 266, 283 (1999); see *Katzenbach*, 383 U.S. at 334-335. In *City of Rome* v. *United States*, 446 U.S. 156 (1980), the Court sustained the application of Section 5 to voting changes that "had not been made for any discriminatory purpose, but did have a discriminatory effect." *Id.* at 172. The Court held that Congress possesses constitutional authority to "prohibit voting practices that have only a discriminatory effect," *id.* at 175, explaining that "Congress may, under the authority of § 2 of the Fifteenth Amendment, prohibit state action that, though in itself not violative of § 1, perpetuates the effects of past discrimination," *id.* at 176.

The fact that Section 5 measures discriminatory effect by reference to a covered jurisdiction's own prior voting practices, rather than by comparison "to what the right to vote *ought to be*" (*Bossier II*, 528 U.S. at 334), creates no constitutional concern. This Court has repeatedly applied Section 5's effects prong, and has distinguished the discriminatory effects prohibited by Section 5 from those proscribed by Section 2, without suggesting that Section 5's focus on "retrogression" renders it vulnerable to constitutional attack. Indeed, if Congress may "prohibit state action that * * * *perpetuates* the effects of past discrimination," *City of*

Rome, 446 U.S. at 176 (emphasis added), it may surely ban voting changes that would *exacerbate* the effects of past discrimination by *reducing* minority electoral strength in jurisdictions with a history of discriminatory conduct.

III. THE QUESTION WHETHER PRIVATE PARTIES MAY INTERVENE IN JUDICIAL PRECLEARANCE SUITS UNDER SECTION 5 IS MOOT AND WAS CORRECTLY RESOLVED BY THE DISTRICT COURT

Appellant argues (Br. 40-44) that the district court erred in allowing four African-American Georgia voters to intervene in the State's declaratory judgment action in order to challenge the legality of plans and districts that the United States did not oppose.[14] See J.S. App. 214a-219a. Because a ruling favorable to appellant on that issue would not affect the district court's judgment, the question whether the district court appropriately allowed intervention is moot, and this Court should not address it. In any event, appellant's argument lacks merit.

A. The Question Whether The District Court Properly Allowed Intervention In This Case Is Moot

The State does not contend that the district court's judgment would be in any way affected if this Court were to hold that Section 5 bars private intervention in a judicial preclearance action. Any such contention would be implausible. The district court granted

[14] Appellant appears to have abandoned its prior contention (J.S. 28-30) that the intervenors in this case lacked Article III standing. For the reasons set forth by the district court (J.S. App. 30a-31a) and in the United States' Motion to Affirm (at 19-21), the intervenors had standing in this case.

appellant's request for a declaratory judgment with respect to its congressional and state house districting plans. See J.S. App. 145a-147a. With respect to appellant's original state senate plan, the district court based its decision denying preclearance on the likely retrogressive effects of the plan in the three districts (Districts 2, 12, and 26) identified by the United States as those in which retrogression appeared likely. Thus, even if the retrogression inquiry in a Section 5 judicial preclearance action is properly limited to those aspects of the proposed voting changes that are disputed by the parties—a proposition that the district court in this case squarely rejected, see *id.* at 103a-106a; p. 9, *supra*—there can be no colorable argument that the participation of the individual African-American voters as intervenors affected the district court's ruling on the merits of the case. Whether or not the district court acted correctly in granting leave to intervene, that interlocutory ruling has no continuing effect on the State's rights and obligations under Section 5. Appellant's objection to that interlocutory ruling is therefore moot, and this Court should not address it.[15]

[15] The four African-American voters who were granted leave to intervene in the district court did not appeal the court's rulings on the merits. See note 4, *supra*. If those individuals had sought to appeal the portions of the district court's decision that were favorable to the State (*i.e.*, the court's grant of preclearance with respect to appellant's congressional, state house, and revised state senate districting plans), the question whether the voters were properly given party status in the district court would indeed be relevant to the proper disposition of their appeal. But the propriety of allowing those persons to intervene in the district court has no bearing on the correct resolution of the State's appeal from the district court's denial of preclearance of the original proposed senate plan.

Appellant contends (Br. 42) that the participation of the intervenors "expanded the scope of the case from three Senate districts to include the entire Georgia House and congressional plans," and rendered the proceedings in the district court more arduous and complex. It is far from clear that this is so. The district court found that the State's request for a declaratory judgment "impose[d] on th[e] court an affirmative duty to inquire whether the [districting] plans have the effect or purpose of denying or abridging the right to vote on account of race or color." J.S. App. 104a. In light of that conception of its duties, the district court would likely have considered itself obliged to inquire into the probable effects of the congressional and state house districting plans even if the private intervenors had not participated (or had participated solely as amici) in the declaratory judgment action. In any event, appellant identifies no means by which this Court could now redress any inconvenience or increased litigation burdens that the State may have suffered as a result of the district court's order granting the private parties leave to intervene.

B. The District Court Acted Properly In Allowing Individual African-American Voters To Intervene In The State's Declaratory Judgment Action

Under Section 5, a covered jurisdiction that seeks to adopt a change in voting practices may either (1) sue for a declaratory judgment from a three-judge district court in the District of Columbia, or (2) request administrative preclearance from the Attorney General. 42 U.S.C. 1973c. Appellant asserts (Br. 40) that in a Section 5 declaratory judgment action, "the Attorney General maintains his unique role as the sole statutorily designated defendant." Nothing in the text of Section 5

provides that the Attorney General shall be the exclusive defendant in such a proceeding, however, nor does the statute by its terms bar private parties from intervening. See 42 U.S.C. 1973c.

Actions for declaratory judgment filed in district court are governed by the Federal Rules of Civil Procedure, which include provisions specifically addressing intervention. See Fed. R. Civ. P. 1, 24; see also *NAACP* v. *New York*, 413 U.S. 345, 365 (1973) (applying Rule 24 to an application for intervention in a declaratory judgment action under the Voting Rights Act). Rule 24 states that leave to intervene shall be granted "when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." Fed. R. Civ. P. 24(a)(2). Because the United States in this case opposed only the state senate plan, the district court concluded that the intervenors' interest in opposing the other two plans was not adequately represented by the United States. Accordingly, the court granted the intervenors' application under Rule 24. See J.S. App. 214a-219a. In light of the absence of any indication in the text or history of Section 5 that Congress did not intend the usual rules governing intervention to apply to a judicial preclearance action, the district court acted properly in granting the individual voters' intervention request.[16]

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[16] In *City of Richmond*, the district court similarly permitted intervention when the City requested a declaratory judgment that a proposed annexation did not have a prohibited retrogressive

Appellant's reliance (Br. 41-42) on *Morris* v. *Gressette*, 432 U.S. 491 (1977), is misplaced. In *Morris*, this Court held that, in an administrative preclearance proceeding, the decision whether to interpose an objection to a proposed voting change is committed to the Attorney General's discretion and is therefore not judicially reviewable. *Id.* at 504-507. Because the Court's holding rested in part on the important *differences* between administrative and judicial preclearance procedures under Section 5, see *id.* at 502-503, *Morris* has little bearing on the proper disposition of the question presented here. The Court in *Morris* did not address the right of private parties to intervene in a declaratory judgment action, much less suggest that the pertinent provisions of the Federal Rules of Civil Procedure are inapplicable in this setting. The State here voluntarily chose to forgo submission of its plan to the Department of Justice, and it thereby opted for the rules applicable in a civil action, rather than the rule of *Morris*.

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purpose or effect. Although the Attorney General indicated approval of the plan, a group of residents who opposed it were permitted to intervene. See 422 U.S. at 366. As a result, the City and the intervenors continued in litigation, and the lower court eventually concluded that the City had failed to meet its burden of proof. *Id.* at 366-367. This Court noted probable jurisdiction, see *id.* at 367, and subsequently reversed on the merits, see *id.* at 367-379. Although this Court did not specifically address the propriety of the district court's decision to permit intervention, "neither did the Court question the district court's exercise of jurisdiction." J.S. App. 105a. Indeed, as the district court in the instant case correctly noted, this Court in *City of Richmond* "remanded the case to the district court for further proceedings" in light of the Court's opinion. *Ibid.*; see 422 U.S. at 378-379.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

RALPH F. BOYD, JR.
Assistant Attorney General

PAUL D. CLEMENT
Deputy Solicitor General

MALCOLM L. STEWART
Assistant to the Solicitor General

MARK L. GROSS
TOVAH R. CALDERÓN
Attorneys

APRIL 2003

APPENDIX

ATTACHMENT A

The following table summarizes the reductions of BVAP in the 46 districts that had majority BVAPs under the benchmark plans. The districts to which the United States interposed an objection are marked with an asterisk (*). The table is arranged in descending order, from the largest reduction in BVAP to the smallest. The table is based on appellant's method of calculating black population figures.

District (Benchmark/ Proposed)	Benchmark BVAP	Proposed BVAP	Reduction
House 54/47	94.12%	60.12%	34.00%
House 73/60	93.38%	59.51%	33.87%
House 71/61	91.82%	58.33%	33.49%
House 53/48	92.49%	61.13%	31.36%
House 72/59	91.23%	61.86%	29.37%
Senate 43	88.91%	62.63%	26.28%
House 70/60	85.18%	59.51%	25.67%
House 117/97	74.04%	53.24%	20.80%
House 51/44	78.46%	59.18%	19.28%
House 52/45	82.43%	64.55%	17.88%
House 68/59	79.39%	61.86%	17.53%
Senate 38	76.61%	60.29%	16.32%
House 118/98	73.35%	57.63%	15.72%
Senate 35	76.02%	60.69%	15.33%
House 49/43	79.39%	65.18%	14.21%
House 148/124	67.97%	54.14%	13.83%
Senate 22	63.51%	51.51%	12.00%
House 136/111	67.92%	56.16%	11.76%
Senate 55	72.40%	60.64%	11.76%
Senate 26*	62.45%	50.80%	11.65%

House 127/107	75.13%	63.60%	11.53%
House 124/105	70.08%	58.71%	11.37%
Senate 15	62.05%	50.87%	11.18%
House 50/43	75.50%	65.18%	10.32%
Senate 2*	60.58%	50.31%	10.27%
House 55/48	71.00%	61.13%	9.87%
House 162/135	70.69%	60.86%	9.83%
House 65/55	71.76%	62.30%	9.46%
House 149/124	62.98%	54.14%	8.84%
House 58/48	69.37%	61.13%	8.24%
House 120/95	52.92%	45.10%	7.82%
Congress 5	58.85%	52.04%	6.81%
House 151/125	52.09%	45.46%	6.63%
Senate 10	70.66%	64.14%	6.52%
House 57/50	70.75%	65.38%	5.37%
House 140/114	58.21%	53.07%	5.14%
Senate 12*	55.43%	50.66%	4.77%
House 121/103	51.58%	47.79%	3.79%
House 133/113	57.79%	54.26%	3.53%
Senate 36	60.36%	56.94%	3.42%
House 66/57	62.76%	59.59%	3.17%
House 64/61	61.60%	58.33%	3.27%
House 161/136	64.68%	61.62%	3.06%
House 116/100	52.81%	50.05%	2.76%
House 56/51	54.72%	52.07%	2.65%
House 93/81	75.76%	75.17%	0.59%

See Pl. Exhs. 1E, 2D, 8E, 9D, 11E, 12D.

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No. 02-182

IN THE

Supreme Court of the United States

STATE OF GEORGIA,

Appellant,

v.

JOHN ASHCROFT, Attorney General, *et al.*,

Appellees,

and

PATRICK L. JONES, *et al.*,

Appellee Intervenors.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF APPELLEE INTERVENORS PATRICK L. JONES, ROIELLE L. TYRA, GEORGIA W. BENTON, AND DELLA STEELE

FRANK B. STRICKLAND
ANNE W. LEWIS
STRICKLAND BROCKINGTON LEWIS LLP
Suite 2000
1170 Peachtree St., N.E.
Atlanta, GA 30309
(678) 347-2200

E. MARSHALL BRADEN*
AMY M. HENSON
BAKER & HOSTETLER LLP
Suite 1100
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 861-1500

* *Counsel of Record*

Attorneys for Appellee Intervenors Patrick L. Jones, Roielle L. Tyra, Georgia W. Benton, and Della Steele

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QUESTIONS PRESENTED

I. In denying preclearance of a redistricting plan under Section 5 of the Voting Rights Act, did the district court correctly refuse to substitute Appellant's Section 2-based "point of equal opportunity" analysis for the established Section 5 retrogression analysis?

II. Is the retrogression analysis established by this Court under Section 5 of the Voting Rights Act constitutional?

III. Does Section 5 of the Voting Rights Act preclude the district court from applying Federal Rule of Civil Procedure 24 to permit intervention by interested minority voters in a judicial preclearance action?

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STATUTORY PROVISIONS INVOLVED

This appeal involves Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c. Pursuant to the theory articulated by Appellant State of Georgia ("Appellant"), this appeal also involves Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973.

STATEMENT OF FACTS

GEORGIA'S 2001 REAPPORTIONMENT: After the release of the 2000 decennial census figures in March 2001, Appellant, and most other states, began the process of redistricting its Congressional and state legislative districts. While all state redistricting plans must comport with the Constitutional principle of "one person, one vote" and the requirement of equal electoral opportunities under Section 2 of the Voting Rights Act, Congress imposed an additional requirement upon jurisdictions with egregious histories of discriminatory voting practices. Determining that it was necessary for such jurisdictions to prove, by way of a federal preclearance process, that changes in voting laws or practices were not simply new ways of discriminating or "backsliding" from previous gains in minority voting rights, Congress passed Section 5 of the Voting Rights Act.

Section 5 imposes upon covered jurisdictions the burden of proving that their proposed changes in voting laws or practices do not have the purpose, and will not have the effect, of denying or abridging the right to vote on account of race, color, or membership in a language minority group. 42 U.S.C. § 1973c. In meeting this burden, Section 5 requires jurisdictions to demonstrate that their proposed changes do not "retrogress," or worsen, the ability of minorities to participate in the electoral process and to elect their candidates of choice. Section 5 applies to a number of individual cities and counties throughout the country, but it applies on a statewide basis to only nine states. Appellant is one of those states and therefore faces a hurdle that most

states do not in devising and implementing its statewide redistricting plans.

In violation of its Section 5 obligation,[1] the General Assembly and the then-Governor of Georgia ignored the demographic changes documented by the new census and gerrymandered minority voters in order to maximize the political power of the Democrat party. The General Assembly passed, and the Governor approved, three separate redistricting plans: one for Georgia's Congressional districts, one for the State House of Representatives, and one for the State Senate.[2] When compared to the last legally enacted and precleared plans in place, the so-called "benchmark plan," all three plans demonstrated a marked decrease in the percentage of black voting age population ("BVAP") and the percentage of black registered votes ("BREG") in majority-minority districts, even though the 2000 figures showed that BVAP and BREG increased in Georgia over the preceding decade. (Int. Exs. 1, 2, 8, 9, 18 and 19).[3]

1. A visual review of Appellant's maps of the Congressional, House and Senate plans shows that Appellant also disregarded traditional redistricting criteria, such as geographic compactness and the preservation of political subdivisions and precinct boundaries, to achieve its partisan goals. Plainly, even a cursory examination of Appellant's maps shows that the uncouth and bizarre districts described by Justice Stevens in *Karcher v. Daggett*, 462 U.S. 725, 762 (1983), abound. (Int. Ex. 2, 9, 19).

2. The State Senate redistricting plan was approved by the Georgia Senate on August 10, 2001, and by the Georgia House of Representatives on August 17, 2001. The State House redistricting plan was passed by the Georgia House of Representatives on August 29, 2001 and by the Georgia Senate on September 6, 2001. The Congressional redistricting plan was passed by both houses of the Georgia General Assembly on September 28, 2001.

3. In this Brief, citations are to the Jurisdictional Statement of Appellant, State of Georgia, filed July 31, 2002 ("J.S."); to the transcripts from the trial and closing arguments before the United States District Court for the District of Columbia, held on February 4-8, 2002 and February 26, 2002, respectively ("Tr."); to the trial exhibits submitted by Appellant (Cont'd)

Nowhere were the decreases in BVAP and BREG in majority-minority districts more egregious than in the State Senate plan ("the first Senate plan"). While the benchmark plan had thirteen districts with black population ("BPOP") above 59%, the first Senate plan contained only seven such districts. The decrease in BVAP in the plan was even more significant. In the benchmark plan, 12 districts had a BVAP of more than 54%; the first Senate plan contained only seven such districts. Of the remaining six districts, all had a BVAP of less than 52%. In eight of the twelve districts, the BVAP decreased by more than 10%. (Pl. Ex. 1A; Int. Ex. 2; Int. Ex. 30; Int. Ex. 32). Indeed, as noted by the district court, the first Senate plan included four districts in which the BVAPs were reduced to "bare majorities," although the benchmark BVAPs for those districts ranged from 55.43% to 62.45%.[4] (J.S. 113a-114a).

Similarly, although the benchmark Senate plan contained 13 districts in which the BREG was 52% or higher, the first Senate plan contained only seven such districts. Of the remaining six districts, the BREG in five of the districts (Districts 2, 12, 22, 26 and 34) decreased to less than 50%, and in the sixth (District 15) the BREG was just 50.25%. (Pl. Ex. 1A; Int. Ex. 2; Int. Ex. 30; Int. Ex. 32).

(Cont'd)

("Pl. Ex."), by Appellee United States ("U.S. Ex.") and by Appellee Intervenors Jones, Tyra, Benton and Steele ("Int. Ex."); to the deposition testimony of witnesses ("Depo., page: lines"); to Appellee Intervenors' Motion to Dismiss Appeal or, in the Alternative, to Affirm Summarily ("Int. Motion to Dismiss"); and to the brief of Appellant to this Court ("App. Brief").

4. Similarly, unnecessary BVAP reductions in majority-minority district were made in the State House and Congressional plans. Because the General Assembly converted the House plan from 180 single-member districts to a plan containing both multi-member and single-member districts, it is difficult to assess the precise decrease in minority voting strength. However, it is clear that the House plan contains seven majority-minority districts in which BVAP was reduced. (J.S. 57a-71a). In the new Congressional plan, the BVAP in the majority-minority Fifth District was reduced from the benchmark by more than 5%. (J.S. 47a-54a).

APPELLANT'S DECLARATORY JUDGMENT ACTION FOR PRECLEARANCE: In an apparent effort to circumvent rejection by reducing the amount of expected negative public comment on the plans, Appellant took the unusual step of pursuing Section 5 preclearance through a declaratory judgment action in the United States District Court for the District of Columbia ("the district court"), rather than in an administrative proceeding before the Department of Justice ("DOJ") where public comment would have been invited. 28 C.F.R. § 51.29 (2002). Although Section 5 provides that covered jurisdictions may obtain preclearance by either route, the option of proceeding with a declaratory judgment action in the district court is rarely used because it is neither as expeditious nor as cost efficient as obtaining preclearance administratively through a DOJ proceeding. Indeed, in the 37 years since the passage of the Voting Rights Act, Appellant has *never* sought judicial preclearance of the numerous redistricting plans it has submitted, other than in one instance in which the DOJ had objected to its proposed plan. *See Busbee v. Smith*, 549 F. Supp. 494 (D.D.C. 1982). Despite this history, Appellant filed a declaratory judgment action in the district court on October 10, 2001, seeking preclearance of all three plans. Ironically, Appellant asserted that it was pursuing a litigation route in order to speed the process.

APPELLANT'S OBJECTIONS TO INTERVENTION: Shortly after Appellant filed its complaint, Appellee Intervenors, all African-American voters in the State of Georgia, moved to intervene as Defendants, contending that the proposed plans were not entitled to preclearance because they abridged the voting rights of minority citizens. Despite Appellant's repeated objections to intervention by Appellee Intervenors,[5] the district court ultimately

5. In total, Appellant attacked Appellee Intervenors' intervention on at least seven separate occasions. As a result, the parties briefed the intervention issue seven times, and the district court heard oral argument on the topic three times.

permitted intervention on all three plans.[6] (J.S. 214a). The district court made clear, however, that the intervention of Appellee Intervenors would not be permitted to cause a delay of the trial, scheduled to begin less than ten days after entry of the court's order. (J.S. 219a). All pretrial proceedings and the trial took place as scheduled, although the late date of the district court's order allowing full intervention limited Appellee Intervenors' ability to participate in discovery and to fully address the issue of retrogression in the three plans.

TRIAL IN THE DISTRICT COURT: On February 4, 2002, the district court began a four-day trial. Instead of presenting evidence demonstrating that the plans had neither the purpose nor the effect of reducing minority voting strength and therefore complied with Section 5, Appellant presented evidence on a different question. Because Appellant could not deny the reductions in minority voting strength evident on the face of the plans, particularly the first Senate plan, Appellant built its case around a purported Section 2, rather than Section 5, analysis. In short, Appellant's theory was, and remains, that the reductions in minority BVAP and BREG did not result in retrogression because, according to Appellant's expert and some lay witnesses, the plan provided minority voters an "equal opportunity," *i.e.*, a 50/50 chance, to elect candidates of their choice in majority-minority districts. Under Appellant's analysis, the benchmark from which to measure retrogression would not be the last legally enforceable plan, but a Section 2-based, hypothetical "point of equal opportunity" plan. To create that hypothetical plan and argue for its substitution in the retrogression analysis, Appellant relied upon: (1) a novel methodological analysis performed by its expert; (2) lay witness testimony that the minority community's candidates of choice might have

6. The district court initially denied intervention pending Appellee United States' announcement of its position on the plans. The court subsequently allowed intervention as to the state legislative plans and shortly thereafter, as to the congressional plan.

an equal opportunity of winning under the first Senate plan; and (3) the assertion that the plans had the strong support of minority legislators and, by implication, their constituents.

APPELLANT'S FAILURE TO PRESENT ADEQUATE EXPERT TESTIMONY: Appellant's expert, Dr. David Epstein, wholly failed to address the Section 5 inquiry. Rather than examining the reduction of voting strength in the new districts, Dr. Epstein focused on defining a point at which minority voters had an "equal" or "fair" opportunity to elect candidates of their choice. Not surprisingly, Dr. Epstein concluded that the first Senate plan allowed minority voters this "equal" opportunity. Dr. Epstein based his conclusion solely on what he called "probit analysis."[7] Probit analysis is not the standard methodology used in the scholarly literature or approved by any court in evaluating the retrogressive effect of redistricting plans.[8] (Int. Ex. 25a). In fact, probit analysis has never been cited by any court in any redistricting or voting rights case. The unpopularity of

7. Probit analysis is a form of linear regression analysis that is generally applied to models in which the dependent variable is limited or categorized. It is commonly used to analyze binary dependent variables. For example, the independent variable could be the percentage of black voting age population, while the dependent variable could be limited to two options: (1) victory by the black candidate; or (2) loss by the black candidate. But because the dependent options are limited in number, the difference in values in the black population may not be as important in this type of analysis. Normal linear regression would use the variation in the independent variable (percentage of black voting age population) to provide an estimated value for the dependent variable (percentage of the vote). Probit analysis tends to minimize variations in the independent variable and does not use the known information to the fullest extent possible. Therefore, it is not a very robust method for analysis in most redistricting situations.

8. The accepted method of inferring voting behavior from aggregate information is known in the academic literature as "ecological inference." *Thornburg v. Gingles*, 478 U.S. 30, 52-53 (1986). Dr. Richard Engstrom, who testified for the Appellee United States, used this standard statistical analysis.

probit analysis in the redistricting context is well justified by the multiple problems inherent in applying it in this context. As explained by Appellee Intervenors' expert, Dr. Jonathan Katz, the probit method of analysis allows one to sweep "a lot of things under the rug that you don't see."[9] (2/6/02 Aft. sess. Tr., pp. 101-102). Primarily, probit analysis is a weak analytical tool in the redistricting context because it tends to minimize the differences in demographic and political factors between districts. Moreover, used in isolation, probit analysis is an unreliable means of assessing the probability of electing black candidates of choice. (2/6/02 Aft. sess.Tr., pp. 33-34). The analysis does not examine black turnout rate or black voting behavior at the district level, (2/6/02 Aft. sess.Tr., pp. 111-122), assumes that blacks only vote for black candidates, (2/6/02 Aft. sess. Tr. pp. 110-112), and does not account for the possibility that white crossover votes may account for a black candidate being elected.

Additionally, Dr. Epstein's analysis failed to identify the decreases in BVAP under the first Senate plan or the corresponding reductions in the ability of minority voters to elect candidates of choice. (J.S. 121a). Although the proposed plan contained six districts (of 13) in which the BVAP fell to between 50.3% and 51.5%, Dr. Epstein did not consider the effect of reducing BVAPs to these "bare majorities." (J.S. 97a). Instead, Dr. Epstein simply calculated a "point of equal opportunity" number (anything greater than 44.3% BVAP). Using that number, he identified the number of districts that he deemed majority-minority. As recognized by the district court, Dr. Epstein's application of the probit methodology in this manner "rendered his analysis all but irrelevant to the issue of retrogression."

9. Appellant's suggestion that Dr. Katz previously used probit analysis in the same manner as Dr. Epstein mischaracterizes Dr. Katz's testimony. While Dr. Epstein used probit analysis as the sole basis for his retrogression analysis, Dr. Katz testified that he had previously utilized the methodology only in conjunction with other analyses and that a probit analysis alone could not provide a basis for an opinion on retrogression. (2/17/02 Tr., pp. 99-100, 107).

(J.S. 121a). In particular, the district court criticized Dr. Epstein's failure to consider two important factors: (1) the decreases in BVAP under the first Senate plan and any corresponding reductions in the ability of minority voters to elect candidates of choice; and (2) the extent of racial polarization and white crossover voting. The district court concluded that Dr. Epstein's testimony was relevant only "insofar as it suggests that decreases in BVAP within the ranges proposed in the contested Senate districts may have a significant (if inadequately quantified) *negative* impact on the likelihood that African American voters will be able to elect their candidates of choice." (J.S. 123a) (emphasis added).

In addition to ignoring the BVAP decreases and the impact of such, Dr. Epstein conceded that he did not consider racial polarization: "the whole point of my analysis is not to look at polarization per se." (J.S. 127a). Dr. Epstein further believed that "the great advantage of using the probit analysis" is that he did not have to consider, among other things, white crossover voting. (J.S. 127a, n.39). To the extent that Dr. Epstein did consider white crossover voting, his analysis was based *entirely* on data from three statewide general elections, as opposed to data from district-wide elections. (J.S. 91a, 144a). Because the record showed that "African American candidates of choice running for State Senate seats are unlikely to receive the same levels of white crossover voting as may occur in statewide elections," the district court rejected Dr. Epstein's analysis on this issue. (J.S. 144a).

In its final analysis, the district court found that Dr. Epstein "made no attempt to address the central issue before the court: whether the State's proposal is retrogressive" and deemed his testimony "woefully inadequate." (J.S. 121a, 143a). According to the district court, the lack of information in Dr. Epstein's report rendered it useless in assessing "the expected change in African

American voting strength statewide that will be brought by the proposed Senate plan." (J.S. 121a).

Although relying heavily on Dr. Epstein's testimony during trial, counsel for Appellant conceded in his closing argument the worthless nature of Dr. Epstein's analysis: "I do not think Doctor Epstein truly, your Honor, is essential to any aspect of this case." (2/26/02 Tr., p. 60). On this point, the district court agreed, finding that Dr. Epstein's analysis, while perhaps having some relevance to a Section 2 case, was not "in any way dispositive of a Section 5 inquiry." (J.S. 119a-120a; J.S. 207a-210a).

APPELLANT'S FAILURE TO PRESENT ADEQUATE LAY WITNESS TESTIMONY: In addition to Dr. Epstein's testimony, Appellant relied upon cross-examination testimony of incumbent legislators that the electoral opportunities in the majority-minority districts, though reduced, were "equal." The testimony to that effect of incumbent Congressman Lewis, Senator Brown and then-Senator Walker contrasted sharply, however, with that of other lay witnesses. Every non-legislator citizen witness expressed grave concern that the first Senate plan would weaken minority electoral opportunities.

Many of the lay witnesses testified that the General Assembly "sacrificed" minority voters in an attempt to maintain and build a stronger Democratic majority. As examples, Appellee Intervenor Patrick Jones, who has had a long-standing interest and involvement in redistricting, testified that he saw the redistricting process as a "kind of preservation plan for white Democrats." (Jones Depo., 41:4-5). Edna Jackson, a Savannah City Council member, testified that black voters who could have been placed in Senate District 2 were sacrificed to allow more Democratic districts to be created elsewhere. (U.S. Ex. 502, ¶ 4). William Barnes, treasurer of the Bibb County Board of Education, testified that the Democrats sacrificed black voting strength to accomplish their goal of maximizing political strength.

(U.S. Ex. 516, ¶ 13). Burt Bivins, a member of the Bibb County Board of Commissioners, testified that with respect to Senate District 26, the desire to ensure Democratic strength took precedence over the need to preserve minority voter opportunity. (U.S. Ex. 517, ¶ 11). Finally, Dr. Prince Jackson, a member of the Executive Committee of the Savannah Branch of the NAACP (and now its President) testified: "Democrats in Atlanta have chosen to preserve their majority in the State Senate at the expense of African-American voters, who are getting nothing in return." (U.S. Ex. 503, ¶ 12). This testimony is consistent with the express goal of Appellant that the redistricting process be manipulated to maintain or increase Democrat membership in the Georgia Senate.

Multiple lay witnesses also testified about the difficulty that minority communities face in electing candidates of choice when the number of minority voters in a district is reduced. Appellee Intervenor Jones testified that "it is difficult, if not impossible, for most minority communities to elect candidates of choice when the district's minority voting age population . . . is less than 55%." (Int. Ex. 27, p. 2). Like Appellee Intervenor Jones, Appellee Intervenor Steele testified that she did not believe that a minority community could elect a candidate of its choice with less than 55% BVAP. (Steele Depo., 29: 7-11). While Appellee Intervenor Steele's minority community was previously part of the majority-minority Senate District 2, the first Senate plan put her community into Senate District 4, which was not a majority-minority district. She believed that the change effectively disenfranchised her community:

> While I was once part of a majority-minority district [Senate District 2] where I could effectively use my vote to help the minority community elect a candidate of choice, my minority community and I are now part of the Fourth Senate District, where we cannot hope to elect a candidate of choice, unless that candidate happens to be the choice of the 70% white population as well.

(Int. Ex. 28, pp. 1-2). Appellee Intervenor Steele's belief that redistricting disenfranchised her led to her involvement in this case.[10] (Int. Ex. 28, p. 2). Appellee Intervenor Benton also was a resident of Senate District 2 who was placed in District 4 under the first Senate plan. She testified that "when you take us from a larger group of voting blacks, it diminishes us. You leave us paying taxes without any formal representation. You leave us paying taxation without representation. We will have none. We won't have any at all." (Benton Depo., 19:12-17).

In addition to Appellee Intervenors, other citizen witnesses throughout the state gave testimony about the discriminatory nature of the plans. In Savannah, witnesses testified to the detrimental effect of the plans, primarily in District 2 of the first Senate plan. For example, Helen Johnson, who has lived in Savannah for 43 years and is the Chief Executive Officer and Chairman of the Board of Directors of the Ralph Mark Gilbert Civil Rights Museum, testified that she wrote then-Governor Barnes and told him that Senate District 2 should not be changed "because if we lose that district, then we're going to lose some of our power or all of our power in that area." (H. Johnson Depo., 16:6-10). Richard Shinholster, who has lived in Savannah for all but two of his 60 years and who is active in the local NAACP, testified that the local chapter of the NAACP held a mass meeting regarding redistricting and determined that "the voting strength of African-Americans in Savannah, especially the second senatorial district, had been diluted." (Shinholster Depo., 9:1-8). Harris Odell and Joe Murray Rivers, both Chatham County Commissioners, and David Jones and Gwendolyn Goodman, both members of the Savannah City Council, also testified that adding predominately white areas to Senate District 2, as the first Senate plan did, would make it more difficult for African-Americans to elect candidates of their choice in that

10. Senator Regina Thomas, who represents District 2, also testified that voters such as Appellee Intervenor Steele would be disenfranchised by being moved out of the district. (Thomas Depo., 82:19-83:24).

district.[11] (U.S. Ex. 507, ¶ 6; U.S. Ex. 508, ¶ 8; U.S. Ex. 506, ¶ 5; U.S. Ex. 501, ¶ 8).

In Albany, where proposed Senate District 12 is located, lay witnesses testified that minority citizens would not be able to elect candidates of choice in the proposed district. Charles Sherrod, a leader in the Civil Rights movement in southwest Georgia and a member of the Dougherty County Commission for 14 years, testified that "black candidates [sic] will not have the opportunity to elect candidates of their choice under the proposed plan for Senate District 12. This is because the plan decreases the black voting age population figures when it was already difficult to elect a black candidate." (U.S. Ex. 510, ¶ 11). David Williams, an Albany City Commissioner for ten years and a lifelong resident of southwest Georgia, testified that the proposed Senate plan "is bad for black voters in Senate District 12 and doubly bad for black voters in Dougherty County." (U.S. Ex. 512, ¶ 4). Based on his review of voter registration information and his own experience as a candidate, Mr. Williams did not believe that a black candidate could be elected from proposed Senate District 12. (U.S. Ex. 512, ¶ 6). In addition, he believed that the plan was "doubly bad" for the black voters in Dougherty County because, under the benchmark plan, those voters were part of a majority-minority district and were represented by one senator, but under the first Senate plan some black voters would be shifted to Senate Districts 13 and 14, majority-white districts.[12] (U.S. Ex. 512, ¶ 7).

11. Similar views were expressed by Savannah City Councilwoman Edna Jackson (U.S. Ex. 502, ¶ 10), and Dr. Prince Jackson, (U.S. Ex. 503, ¶ 19).

12. Such opinions also were expressed by Arthur Williams, (U.S. Ex. 511, ¶ 11); William Wright, a former President of the Dougherty County branch of the NAACP, (U.S. Ex. 514, ¶ 36); and John White, who served in the Georgia House of Representatives for 22 years, (U.S. Ex. 513, ¶¶ 2, 5, and 23).

In Macon, where proposed District 26 is located, the story was the same. William Barnes testified that a district with a BVAP of less than 50%, like District 26 is in the first Senate plan, "leaves black voters on a less than equal playing field." (U.S. Ex. 516, ¶ 9). Bert Bivins similarly testified that based on his personal knowledge and experience, "there is no question that proposed Senate District 26 makes it more difficult for minority voters to elect their candidates of choice." (U.S. Ex. 517, ¶ 10).

In summary, although some lay witnesses may have acknowledged a *possibility* that a minority community's candidate of choice might still win in a district with reduced BVAP or BREG, the overwhelming testimony of the lay witnesses was that the reductions in BVAP and BREG in the first Senate plan would reduce minority electoral opportunities, a result prohibited by Section 5.

APPELLANT'S ATTEMPT TO JUSTIFY RETROGRESSION:

Appellant attempted to justify the obviously retrogressive first Senate plan in two ways. First, Appellant asserted that the district court should consider the allegedly overwhelming support of minority legislators for the redistricting plans as proof of non-retrogression. Second, Appellant argued that population equality among the districts required the plan to be drawn as it was.

In rejecting the first assertion, the district court found that the evidence did not show that the redistricting plans were resoundingly embraced by minority legislators.[13] (J.S. 134a-135a). Although Appellant's three minority legislator witnesses, Congressman John Lewis, then-Senate Majority Leader Charles Walker, and Chairman of the Senate reapportionment subcommittee, Robert Brown, professed satisfaction with the plans, rank and file members who represent majority-minority districts were much less

13. For reasons discussed in the Argument section, Appellee Intervenors dispute that the support of minority legislators is a relevant focus of the retrogression analysis.

enthusiastic, citing concerns from their constituents, as well as personal concerns.

Senator Horacena Tate testified that her district was the first majority-minority district in Georgia and that her constituents wanted the district "to have a certain amount of integrity and had strong feelings about how the district should look." (Tate Depo., 19:6-10). To address those concerns, she worked on a plan with the state reapportionment office, trying to devise a "map for the 38th District that I thought they would approve of." (Tate Depo., 19:14-17). However, the plan she drew, based on her understanding of her constituents' objectives, was not included in the first proposed Senate plan. (Tate Depo., 18:5-19:24 and 93:7-22). Senator Tate also noted that she did not agree with the final plan submitted by her delegation. (Tate Depo., 98:21-23). Most tellingly, when asked if she was promised anything in exchange for voting on the plan, she testified: "I was told that we would look at the – continue to watch the demographic changes in the district; and if need be, we might be able to go in and make some adjustments." (Tate Depo., 64:16 to 66:2).

Senator Vincent Fort, who represents the majority-minority Senate District 39, succinctly summarized his concerns about the first Senate plan when he addressed the Senate from the well, minutes before passage of the plan:

> I've looked at the data district by district regarding race and black voting districts. I know that ten out of thirteen of these majority black districts have lost black VAP. Eight out of thirteen have lost more than 10 percent of black VAP. And then even more importantly, there are four districts that are below 50 percent black voter registration. I don't know whether that's dilution or retrogression; that's going to be for others to decide who have more experience and learning on the issue. But the question is a valid question.

> If it's raised, one should not question the motives of those who raise it. But there is something going on here in the thirteen districts throughout the state.

(Int. Ex. 16, p. 3).[14]

After the first Senate plan passed, Senator Fort and several other minority legislators wrote to the Chairman of the Georgia Legislative Black Caucus ("GLBC") expressing their continued concerns about the plans that had passed and the lack of involvement of the GLBC in the redistricting process:

> We are concerned that the GLBC has not been involved in the redistricting process almost at all. This has resulted, among other things, in a legislative plan passing that has diluted majority-minority districts in both the House and the Senate. It is unfortunate that the organization with the expressed purpose of representing the interests of African-American Georgians has been almost silent as an organization on the redistricting process which is so important.

(Int. Ex. 17). The authors of the letter closed by demanding a GLBC meeting before the General Assembly considered the next redistricting plan, the Congressional plan. (Int. Ex. 17).

In the face of this testimony, the district court found that the evidence did not, as Appellant maintains, show overwhelming support by minority legislators for the plans. (J.S. 134a). Rather, the evidence showed only that minority legislators *voted* for the plans, not necessarily because they

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14. Senators Donzella James and Regina Thomas also noted the likely retrogressive effect of the first Senate Plan. (James Depo., 63:1-20; Thomas Depo., 82:19-83:24).

embraced them, but because they were convinced that their vote for the plans would be politically expedient. (J.S. 134-135a).

With respect to Appellant's second asserted justification for retrogression – the need to adjust for population loss in majority-minority districts – the district court found that Appellant asserted the population equality argument "without attempting to prove" it. (J.S. 124a). If Appellant's argument were true, then underpopulated majority-minority districts would have had none of their minority population removed; population would simply have been added to bring the district up to the ideal size. However, the evidence showed that minority voters were deliberately removed from underpopulated majority-minority districts and put into other districts in order to avoid, in Appellant's words, "wasting" a minority voter's vote. For example, Appellee Intervenors Benton and Steele were moved from the underpopulated majority-minority Senate District 2 to the overpopulated Senate District 4. The result was that the BVAP in already underpopulated District 2 was reduced by more than 10%. (Pl. Ex. 1A; Int. Ex. 2; Int. Ex. 32). The district court concluded that even if some BVAP reductions were inevitable,

> it certainly does not follow that Georgia was compelled to move minorities out of Districts 2, 12, and 26 to the extent that it did. Indeed, the State actually removed some majority African American precincts from each of these districts, a decision that at least casts doubt on its cries of inevitability.

(J.S. 124a). Finally, the district court noted the existence of alternative plans that it believed would have allowed compliance with the "one person, one vote" principle without moving so many African-Americans out of majority-minority districts. (J.S. 125a). The alternative plans

submitted to the Senate and to the district court prove beyond any doubt the accuracy of the court's observation.[15]

THE DISTRICT COURT'S DENIAL OF DECLARATORY JUDGMENT: None of the evidence presented by Appellant enabled the district court to find that the first Senate plan did not have the effect of denying or abridging minority citizens' right to vote. Rather, the district court recognized the first Senate plan for what it was – a gerrymander of minority voters which reduced their voting strength. Therefore, the district court denied declaratory judgment preclearing that plan.[16]

APPELLANT'S PASSAGE OF A REVISED SENATE PLAN: Following the denial of preclearance, Appellant requested that the district court retain jurisdiction and allow Appellant an opportunity to enact and submit a revised Senate plan. The district court agreed to do so, and the Georgia General Assembly promptly enacted a revised Senate plan. According to Appellant, "[t]he BVAPs and BPOPs in the revised plan were thereby increased substantially." (App. Brief, p. 7). Appellant fails to state, however, that the "substantial" increase was as judged against the rejected first Senate plan, not the benchmark plan. Judged against the benchmark plan, the BPOP and BVAP percentages in many districts are still markedly decreased.

While noting some remaining concern with the revised Senate plan, (J.S. 13a), on June 3, 2002, the district court granted declaratory judgment preclearing it. The following day, Appellant appealed the rejection of the first plan and the preclearance of the second plan.

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15. In fact, the 2003 Georgia State Senate recently passed a plan with a 2% overall population deviation that does not retrogress, that splits half the number of counties as the first Senate plan, and that follows traditional criteria.

16. The court granted preclearance of the State House and Congressional plans. (J.S. 150a).

SUMMARY OF ARGUMENT

Appellant asks this Court to do nothing less than reject more than 25 years of its Section 5 jurisprudence. A review of the Summary of Argument Section of Appellant's Brief crystallizes this point. While Appellant asks the Court to overturn a district court's decision in a declaratory judgment action brought under Section 5, the summary of Appellant's argument as to why that district court's decision is wrong fails to even use the word "retrogression." (App. Brief, pp. 28-29). In fact, Appellant's brief is virtually devoid of any reference to retrogression except when citing language from the district court's opinions which Appellant urges this Court to reject. Effectively, Appellant's brief asks the court to overturn and reject its analysis of the Section 5 retrogression standard first articulated in *Beer v. United States*, 425 U.S. 130 (1976) and consistently applied since then. Appellant argues that this Court was wrong in *Beer*, and calls into question whether Section 5 has been constitutionally interpreted for the last 27 years.

The district court carefully applied this Court's well-established retrogression standard in reaching its decision. It examined a substantial factual record, including the testimony of lay and expert witnesses, to determine whether a new election procedure—the first Senate plan—would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise. After a four-day trial, the district court reached the conclusion that the state had failed to prove that the plan was not retrogressive. The court appropriately compared the existing benchmark Georgia Senate plan—which no party argued was constitutionally or legally invalid—to the first proposed Senate plan. From this comparison, the court determined that minority Georgia voters would have less opportunity to exercise their franchise effectively under the proposed plan. The first Senate plan was retrogressive because black Georgia voters, including Appellee Intervenors, would be less likely to elect

their candidates of choice in proposed Districts 2, 12 and 26, and there was no corresponding increase in black voters' opportunity to elect their candidates of choice in other Senate districts.

In denying preclearance of the first Senate plan, the district court did not require "supermajority, safe seats" in contravention of the Voting Rights Act or the Equal Protection Clause, as Appellant contends. (App. Brief, p. 28). Contrary to Appellant's characterization, the district court did not deny preclearance to the Senate plan because it "'only' afforded African Americans an equal, fair, or reasonable chance of victory." (App. Brief, p. 28). Instead, the district court, applying the clear language of Section 5 and this Court's decisions interpreting Section 5's requirements, denied preclearance because the plan was retrogressive. In refusing to substitute Appellant's purportedly Section 2-based "equal opportunity" analysis for the standard retrogression test of Section 5, the district court neither exceeded the purview of Section 5 nor caused a violation of the Equal Protection Clause.

Finally, Appellant's argument against intervention by the very citizens Section 5 was designed to protect is completely unsupported and contrary to the precedent of this Court. Having instituted litigation to obtain declaratory judgment, Appellant accepted the possibility of intervention by interested parties pursuant to Federal Rule of Civil Procedure 24. If a submitting jurisdiction chooses to bring a declaratory judgment action to obtain preclearance, as opposed to seeking administrative preclearance, the only way that interested minority citizens can participate is by intervention. Appellant's contention that "the grant of a declaratory judgment in a preclearance action does not prevent voters from pursuing any substantive claims they may have" is disingenuous. (App. Brief, p. 41 n.11). There is no alternative mechanism by which Appellee Intervenors might obtain the relief Section 5 provides, that is, the rejection of a retrogressive plan before it is implemented.

The only opportunity for a citizen to address retrogression is during the Section 5 preclearance process. Finally, Appellant's complaints that Appellee Intervenors delayed a decision, prevented the entry of consent decrees, and averted the possibility of "settlement" discussions are specious.

ARGUMENT

I. IN DENYING PRECLEARANCE OF THE FIRST STATE SENATE PLAN, THE DISTRICT COURT DID NOT REQUIRE APPELLANT TO DRAW "SAFE" MINORITY DISTRICTS, BUT INSTEAD PROPERLY INSISTED THAT APPELLANT MEET ITS BURDEN UNDER SECTION 5

In considering whether to grant declaratory judgment preclearing the first Senate plan, the district court simply applied this Court's long-established Section 5 precedent. It did not, as Appellant suggests, capitulate to the so-called "max black" DOJ policy of the 1990s, of which this Court arguably disapproved in the racial gerrymandering cases of that decade. (App. Brief, p.7). Appellant contends that the DOJ has a long history of improperly requiring high levels of minority population in majority-minority districts, that the DOJ persisted in that policy in this case, and that the district court acquiesced to that policy.[17] While this argument might have some relevance in the context of an appeal of the rejection of administrative preclearance by the DOJ (assuming such an appeal is permissible, *see Morris v.*

17. While the DOJ may have previously espoused such a policy, even a cursory review of the DOJ's position in the district court shows that such is no longer the case. In the proposed House and Congressional plans, the decrease in BVAP in many districts was severely reduced, but the DOJ raised no objections to those plans. Furthermore, although every majority-minority district in the Senate plan but one lost BVAP, the DOJ only objected to three districts. Perhaps most significantly, the DOJ approved of the revised Senate plan, even though the BVAPs in the "corrected" districts still fell far below BVAPs in the benchmark and did not exceed 56%.

Gressette, 432 U.S. 491 (1977)), it is of no relevance in this appeal from a three-judge district court decision on preclearance. Instead, this is a classic "straw man" argument.

The record does not support Appellant's contention that the district court extended the reach of Section 5 to require Appellant to draw "safe" majority-minority districts with "supermajority" minority populations. It is clear, from both the trial court's April 5, 2002 Order and June 3, 2002 Order ultimately approving a revised Senate plan, that the district court imposed no such requirement upon Appellant. (J.S. 1a-150a). Instead, the district court simply insisted that Appellant prove that the Senate plan had neither the purpose nor effect of reducing the minority community's ability to elect candidates of choice as compared to the benchmark plan.

A. The District Court's Opinion Faithfully Follows Established Section 5 Precedent

In determining whether a proposed change to a voting practice or procedure has the prohibited purpose or effect of denying or abridging the right to vote on account of race or color in contravention of Section 5, this Court has always focused exclusively on whether the proposed change has a retrogressive purpose or effect. Stated in its simplest terms, "retrogression" means a worsening in the voting rights of minority voters. *See, e.g., Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471 (1997) (*"Bossier Parish I"*); *Holder v. Hall*, 512 U.S. 874, 883 (1994); *City of Lockhart v. United States*, 460 U.S. 125, 135 (1983); *Beer*, 425 U.S. at 140 (1976); "Procedures for the Administration of Section 5 of the Voting Rights Act," 28 C.F.R. pt. 51 (2002); "Guidance Concerning Redistricting and Retrogression Under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c," 66 Fed. Reg. 5412 (Jan. 18, 2001). Preclearance is not warranted unless the covered jurisdiction proves that the proposed redistricting plans do not "lead to a retrogression in the position of racial

minorities with respect to their effective exercise of the electoral franchise." *Beer*, 425 U.S. at 140.

To determine whether minority voters are worse off under the proposed redistricting plan, a comparison is made to the benchmark plan – the plan currently in existence in the state. The district court properly compared the benchmark Senate plan to the proposed first Senate plan and came to the unavoidable conclusion that Appellant was not entitled to preclearance of the proposed plan because Appellant had failed to prove, by a preponderance of the evidence, that the plan would not have a retrogressive effect. Based upon the unrebutted credible expert testimony of the type recognized by this Court as persuasive and upon the testimony of numerous lay witnesses, the district court determined that the first Senate plan had three districts in which the likelihood of the minority candidate of choice being elected decreased.

This retrogression cannot reasonably be disputed and was not disputed before the trial court. The first Senate plan was designed to make it more likely that Democrat candidates would be elected. The political reason for this design was expressly articulated to the district court and even recognized in Judge Oberdorfer's dissent: "[t]he desire to strengthen the position of one political party relative to the other." (J.S. 210a). Appellant's method was to remove minority communities from present majority-minority districts and place them in adjoining districts, the result of which was to make it more likely that a white Democrat would be elected. While Appellant's goal is not politically illogical, its method and the result fly in the face of this Court's traditional Section 5 analysis, which focuses upon a minority community being able to elect candidates of their choice, rather than a minority citizen simply being a minority member of a coalition that elects Democrats. Appellant argued to the district court that Section 5 preclearance should be predicated not upon whether minority voters have the same ability to elect candidates of

choice in specific districts, but because most black voters are Democrats, upon the same or increased ability of Democrat candidates generally to be elected to the Georgia Senate. Appellant would have the preclearance analysis of Section 5 metamorphosed from an examination of retrogression of minority voting rights to an examination of retrogression of Democrat political power.[18] Because of racial polarization and bloc voting, the district court correctly concluded that black Georgia voters were less likely to be able to elect their candidates of choice in the first Senate plan than in the benchmark plan.

B. Section 5 Protects Important Rights, And The District Court Did Not Stretch Its Substantive Limits

The district court did not stretch the substantive limits of Section 5, as Appellant insists. Instead, the district court rejected Appellant's novel legal theory that is contrary to over 25 years of practice and precedent, as well as to the policy considerations underlying the Section 5 preclearance requirement.

Appellant states that Section 5 is an extraordinary transgression of the normal prerogatives of the state. (App. Brief, p. 31). This extraordinary restriction was passed in response to the extraordinary disregard that a few states, such as Georgia, had for the guarantees of the 14th and 15th Amendments to the United States Constitution. *See South Carolina v. Katzenbach*, 383 U.S. 301, 306 (1966). For roughly

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18. It is difficult to conclude that this "max Democrat" approach was contemplated in the most recent renewal of the Voting Rights Act, which was sponsored in the Senate by then-Republican Majority Leader Senator Dole and signed by President Reagan, an action implicitly approving this Court's prior interpretations of Section 5. If this Court had any questions as to whether it had correctly interpreted Congressional intent in its prior Section 5 cases, those should have been answered by Congress's 1982 extension of the Voting Rights Act. *See NAACP v. Hampton County Election Comm.*, 470 U.S. 166, 176 (1985); *City of Pleasant Grove v. United States*, 479 U.S. 462, 468 (1987).

a century, these most fundamental rights were not just ignored in Georgia, they were actively blocked by the State. Georgia systematically frustrated its black citizens' voting rights with numerous state-constructed barriers. The Voting Rights Act was enacted to tear down those barriers, and Section 5 was designed to prevent their reconstruction. *See Bossier Parish I*, 520 U.S. at 478; *Miller v. Johnson*, 515 U.S. 900, 926 (1995).

As discussed above, Appellant drew the first Senate plan in a manner that clearly resulted in a loss of minority voting power and therefore was unable to meet the well-settled burden of proof for establishing that no "backsliding" would occur, *i.e.*, that the plan did not have the purpose and would not have the effect of reducing the ability of minority voters to elect candidates of their choice. 42 U.S.C. § 1973c. While the district court described the record as voluminous, it went on to identify the problem of Appellant's case: The record simply did not contain evidence sufficient for Appellant to meet its burden of proof. (J.S. 143a-145a). Rather than argue that the evidence it offered was sufficient to meet the Section 5 statutory burden, Appellant chose, and continues to choose, to argue for a change in that burden. (J.S. 19).

Because the district court followed this Court's well-established Section 5 jurisprudence, it did not stretch the substantive limits of Section 5. Indeed, it is the argument of Appellant that would expand the analysis required of the district court.

C. The District Court Was Neither Required Nor Permitted To Incorporate Appellant's Section 2 Based Analysis, As Section 5 And Section 2 Have Different Purposes And Standards

According to Appellant, a so-called Section 2 "equal opportunity" analysis should replace the traditional benchmark analysis of Section 5. Thus, if a plan arguably meets Section 2 requirements, it should be precleared.

Apparently, Appellant's argument is that the district court compared the first Senate plan to the wrong benchmark.[19]

The district court's use of the last legally enforceable plan as the benchmark plan is consistent with this Court's long-standing precedent and should be affirmed. The requirement that the existing redistricting plan serve as the benchmark originated with *Beer v. United States*, 425 U.S. 130 (1976), and has since been repeatedly recognized by this Court. *See Young v. Fordice*, 520 U.S. 273 (1997); *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 327-29 (2000) ("*Bossier Parish II*"); *Holder*, 512 U.S. at 883 ("The proposed voting practice is measured against the existing voting practice to determine whether retrogression would result from the proposed change."). In *Bossier Parish II*, the Court made clear that the benchmark cannot be anything other than the last unchallenged legally enforceable plan: "Absent a successful subsequent challenge under Section 2, it [the existing redistricting plan], rather than the 1980 predecessor plan – which contains quite different voting districts – will serve as the baseline against which appellee's next voting plan will be evaluated for the purposes of preclearance." *Bossier Parish II*, 528 U.S. at 327-28 (addressing the issue of mootness). Pursuant to this Court's clear guidance, the District Court properly looked to the Georgia Senate plan used in the 2000 election as the benchmark in this case.

The district court discussed Appellant's argument for a replacement benchmark but rejected it: "Effectively, then, the State would have us adopt the converse of the argument rejected by the Supreme Court in the *Bossier Parish* cases. There, the Court rebuffed the claim that preclearance

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19. Appellant seems to suggest that because the DOJ played a role in the preclearance of the existing plan for the Georgia Senate (presumably by consenting to it, as Appellant did) it should not serve as the benchmark. Appellant, however, has never attempted to prove that the existing plan is unconstitutional. Indeed, the legality of the prior plan would not have been within the jurisdictional ambit of the district court, had Appellant made such an argument.

must be *denied* where a proposed plan *violates* Section 2."[20] (J.S. 112a n.35 (citations omitted) (emphasis in original)). In *Bossier Parish I*, the Court addressed whether Section 2 can be incorporated in the Section 5 preclearance process to prohibit practices which are not retrogressive but do abridge the voting rights of minorities by diluting their voting strength. 520 U.S. 471. In refusing to allow the incorporation, the Court recognized the different purposes and standards of the two sections. *Id.* at 477. The discernable standard of Section 5 allows the district court and the DOJ to do a rapid analysis in the shortened time frames that the preclearance process requires. Section 2 litigation (or for that matter, racial gerrymandering litigation), on the other hand, requires extensive expert testimony and historical evidence. Such analysis would be extremely difficult within the 60-day time frame allotted the DOJ for analyzing retrogression.

Appellant's suggestion that Section 2 should be incorporated to form a hypothetical benchmark for the measurement of retrogression is exactly what the appellants later surreptitiously attempted in *Bossier Parish II*. This Court responded: "Appellants ask us to do what we declined to do in *Bossier I*: to blur the distinction between Section 2 and Section 5 by shift[ing] the focus of § 5 from non-retrogression to vote dilution, and chang[ing] the Section 5 benchmark from that jurisdiction's existing plan to a hypothetical, undiluted plan." *Bossier Parish II*, 528 U.S. at 336.

The Section 2 and Section 5 inquiries cannot be interchanged. In *Holder*, this Court carefully explained the inapplicability of Section 5 retrogression analysis in Section 2 vote dilution cases and, conversely, the inapplicability of Section 2 vote dilution analysis in Section 5 retrogression cases. 512 U.S. at 884-85. The Court held that "[r]etrogression is not the inquiry in § 2 dilution cases," and gave a number

20. Intervenor Appellees assert that an alteration of the standard is immaterial in this case because Appellants never put forward the type of proof necessary to prove that the plan would be an adequate remedy under Section 2.

of examples "to show that a voting practice is not necessarily subject to a dilution challenge under § 2 even when a change in that voting practice would be subject to the preclearance requirement of § 5." *Id.* (citing *Perkins v. Matthews*, 400 U.S. 379 (1971) and *McCain v. Lybrand*, 465 U.S. 236 (1984)). Under Appellant's argument for automatic preclearance of all changes that do not violate Section 2, a district court or the DOJ would be forced to perform a Section 2 analysis in every Section 5 case and be left in a conundrum when a Section 2 vote dilution analysis is not feasible. As Section 5 and Section 2 are not co-extensive in the circumstances they cover – indeed, there are numerous circumstances in which there are changes subject to Section 5 preclearance yet no reasonable or workable vote dilution analysis can be devised – the Court should not accept Appellant's invitation to interchange them.

Appellee Intervenors do not argue that a failure to meet the benchmark necessarily invalidates a plan. The benchmark simply establishes the burden and type of proof that must be provided by the jurisdiction. If a proposed change does not meet the benchmark, the jurisdiction can provide evidence to prove that voting strength less than the benchmark is not legally retrogressive. *See Bossier Parish II*, 528 U.S. at 331. As the DOJ noted in supplementary information accompanying the DOJ's procedures in Section 5 preclearance actions, 52 Fed. Reg. 487 (Jan. 6, 1987), "in the redistricting context a reduction in the number or percentage of minority voters in a particular district may have no impact on the opportunity for effective political participation." The DOJ procedure confirms that "any determination of retrogression will go beyond a simple numerical analysis to include the consideration of all factors that could be relevant to an understanding of impact of the change." 28 C.F.R. § 51.55(b)(1)(2) (2002). Appellant failed to prove that its reductions in minority voting strength did

not damage minority opportunities to elect candidates of their choice or were necessitated by other requirements.[21]

Appellant has attempted to reverse the burden of proof in a Section 5 declaratory judgment action by suggesting that if a jurisdiction asserts that its proposed plan complies with Section 2, then the defendants in the action must prove that the state's plan is not a viable Section 2 remedy. This is simply a "back door" method to attempt to replace the traditional Section 5 benchmark with a hypothetical Section 2 benchmark and thereby reverse the burden of proof. The district court correctly declined Appellant's invitation to ignore the standard established by Section 5 in favor of a new equal opportunity standard.

Appellant's citations to *City of Richmond v. United States*, 422 U.S. 358 (1975), and *United States v. Mississippi*, 444 U.S. 1050 (1980), do not support its argument for changing the Section 5 inquiry. While these cases stand for the proposition that overrepresentation of minority groups cannot be required, a comparison of the Senate benchmark plan, the first Senate plan, and the revised Senate plan precleared by the district court shows that the district court did not require "overrepresentation" of minority citizens. No party or witness even asserted that Georgia's minority voters were or would be "overrepresented" under any plan discussed in this case.[22]

Moreover, these two cases are factually distinguishable from the instant case. In *City of Richmond*, changes in the

21. Other possible justifications, such as adherence to traditional redistricting criteria, *see* 28 C.F.R. pts. 51, 59 (2002), could not be claimed by Appellant. Alternative proposals that were before the legislature and the plan recently passed in the Senate show that Appellant could have met all traditional redistricting criteria and not retrogressed minority voting rights.

22. Following the 2000 election, the 56 member Georgia Senate contained only 11 minority senators. After the 2002 election under the revised Senate plan, the number of minority senators decreased to nine.

City's boundaries increased the percentage of white residents, resulting in a proportional decrease in the percentage of black residents in the City. 422 U.S. at 368. In this case, however, the percentage of white residents in Georgia has decreased since the 1990 Census, resulting in a proportional increase in the percentage of black residents in Georgia. Thus, unlike the City of Richmond, Appellant could not justify the first Senate plan's decrease in minority voting power on geographic or demographic changes. Neither the district court, Appellee United States, nor Appellee Intervenors dispute that the number or make-up of majority-minority districts could have legitimately been changed if there had been demographic or geographic changes which warranted the same.

Similarly distinguishable on its facts, *United States v. Mississippi* involved the decrease in BVAP in three districts in which, even under the benchmark plan, black voters could not elect a candidate of choice. 490 F. Supp. 569, 580 & n.5 (D.D.C. 1979). In contrast, Appellant took districts in which the minority community *could* elect candidates of their choice and made them districts in which, at best, it is *unclear* whether the communities can elect candidates of their choice.

Appellant's last ditch effort to convince this Court that Section 2 standards should be used in this Section 5 case is in the form of an "opening the floodgates" argument. Appellant reasons that unless the Section 2 and Section 5 burdens are exactly the same, Appellant will be subjected to Section 2 claims for "packing," and that such claims "would hardly be frivolous." (J.S. 23). While Appellee Intervenors are surprised that Appellant seems to invite a claim for Section 2 litigation, Appellant's position is not legally sound. First, the type of claim suggested by Appellant was rejected unanimously by this Court in *Voinovich v. Quilter*, 507 U.S. 146 (1993). In *Voinovich*, the Appellant argued that the creation of majority-minority districts at the expense of creating more influence districts

did not constitute "packing," and this Court agreed.[23] Second, the Senate Districts at issue, Districts 2, 12, 15, 22 and 26, at BVAPS of 50.31%, 50.66%, 50.87%, 51.51%, and 50.80%, respectively, can hardly be described as "packed" or "supermajority." Certainly, they could not be subdivided into additional majority-minority districts. Furthermore, the suggestion that such districts exist "over the ardent opposition of the overwhelming majority of Georgia's African-American legislators" is both factually incorrect and legally irrelevant. (App. Brief, p. 36). There is no evidence in the record that minority legislators ardently opposed districts with BVAPs at the levels stated above; in fact, as set forth above, the record establishes that many minority legislators had grave concerns about the decreased BVAPs.[24] (J.S. 134a).

Furthermore, as the district court correctly pointed out, the opinion of minority legislators might be relevant to whether a plan had discriminatory purpose, but those opinions are not relevant with respect to a plan's discriminatory effect. (J.S. 135a). The rights protected by Section 5 are those of voters, not elected officials, even if the elected officials are members of a protected minority. The redistricting process is not meant to guarantee individual legislators tenure in the legislature, and the Court

23. Furthermore no accusation has been made that the districts are geographically bizarre in order to maximize minority voting strength. In fact, they are geographically bizarre in order to minimize it.

24. The Appellee Intervenors' arguments were validated on September 10, 2002, in the Democratic run-off primary in Georgia State House District 44. The longtime African-American incumbent was defeated by a white opponent who received over 95% of the white vote. White voters made up a majority of the voters who turned out on election day. Had the district remained at its benchmark minority voting strength, the choice of a majority of the African-American community, the incumbent, would have won renomination.

Similarly, then-Senate Majority Leader, Charles Walker, who testified that the reduction in BVAP in his district, Senate District 22, would be inconsequential, was defeated by a white Republican on November 5, 2002 in a racially polarized election.

would be remiss to place too much importance on minority incumbent members' analysis of their ability to be reelected. Redistricting plans typically last for ten years.[25] The fact that a particular district might reelect a black incumbent does not answer the question of whether that district still would be able to elect a candidate of choice when the incumbent is no longer a candidate.

In the end, Appellant's case failed because Appellant simply did not produce evidence that allowed the district court to find, using the parameters of Section 5, that the first Senate plan had neither the purpose nor effect of abridging or denying the right to vote based on race. Perhaps knowing that it could not meet that standard, Appellant tried to convince the lower court that a different standard should be used. The district court properly rejected that argument.

25. Appellant insists that no minority legislator should have a "safe seat," a position that begs the question: safe from whom? Numerous white senators have seats in which they are not "safe" from a white opponent, but, in Georgia's racially polarized environment, are certainly safe from a minority opponent. Appellant argues that for minorities to have similar "safe" seats, *i.e.*, safe from white Democrats, is unfair and unlawful. In effect, Appellant argues that majority-minority districts should never be robust. However, without robust districts, it is unlikely that minority representation would continue at even present levels. As recognized by redistricting scholar Bernard Grofman, "the gain in African-American representation cannot be attributed to an increase in the number of African-Americans being elected from non-majority black districts . . . in states with significant black populations. African-American representation increased only because the number and effectiveness of majority black districts increased." Lisa Handley, Bernard Grofman, & Wayne Arden, "Electing Minority-Preferred Candidates to Legislative Office: The Relationship Between Minority Percentages in Districts and the Election of Minority-Preferred Candidates," *Race and Redistricting in the 1990s* at 23 (Bernard Grofman, ed. 1998).

II. THE DISTRICT COURT PROPERLY APPLIED CONSTITUTIONALLY SOUND PRINCIPLES CONSISTENT WITH SUPREME COURT JURISPRUDENCE IN REJECTING APPELLANT'S REDISTRICTING PLAN

A. The District Court Appropriately Required Appellant To Draw Districts That Did Not Retrogress Minority Voting Power

Appellant's second argument is an extension of the first. Appellant asks this Court to find that the district court required the drawing of "supermajority," "safe minority" seats and that such a requirement is unconstitutional. Appellant cannot, and therefore does not, suggest that Section 5's ban against retrogression in a legislative redistricting plan is unconstitutional. *See Georgia v. United States*, 411 U.S. 526 (1973); *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966). Instead, Appellant argues that Section 5 is only constitutional to the extent that it addresses voting discrimination. Appellant asserts that the district court's decision rejecting the first Senate plan went beyond Section 5's purview by requiring "safe seats," thereby giving minorities excessive voting rights. Appellant's constitutional argument is neither factually nor legally sound.

First, Appellant's argument is premised on the unsupported factual contention that the district court required Appellant to draw supermajority, safe seats that guarantee political outcomes. As articulated above, however, the district court did no such thing. Rather, the court examined the evidence presented by Appellant and determined that the state did not satisfy its burden of proving that there was no retrogression in the first Senate plan. Had the district court, as Appellant suggests,

mandated the drawing of supermajority minority districts, the court would undoubtedly have required Appellant to refrain from decreasing the BVAP in *any* of the benchmark majority-minority districts. To the contrary, the district court initially precleared nine districts that decreased BVAP below the benchmark and ultimately precleared a plan in which 12 districts had BVAP decreases. Moreover, the three districts which the court concluded Appellant had failed to prove to be non-retrogressive had BVAPs that were reduced to "bare majorities," although the benchmark BVAPs for those districts ranged from 55.43% to 62.45%. (J.S. 113a-114a). Two of these districts had BREGs of less than 49%, and the third district had a BREG of 51%. Moreover, the Senate districts enacted by Appellant in the revised Senate plan have BREG figures of 55.8%, 51.58% and 54.70%; they are clearly not "super-majority" districts or "packed" districts. Significantly, the district court precleared the revised Senate plan, although it had significantly decreased BVAP and BREG numbers and still caused the court concern, because the court could not "conclude that it is more probable than not that the 2002 plan will result in a reduction of African American voting strength." (J.S. 19a).[26]

In addition to not requiring "supermajority, safe seats," the district court did not, as Appellant asserts, "admit" that its "purpose for increasing the BVAPs in Georgia's Senate was not to address voting discrimination . . . but simply to create safe minority seats." (App. Brief, p. 38). As an initial matter, the district court did not "increase" BVAPs in the Senate districts. As noted above, the revised Senate plan drawn by Appellant actually had districts with BVAPs *lower* than those in the benchmark plan. Second, the district court's rejection of the first Senate plan *did* address voting discrimination – the voting discrimination that occurred

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26. Appellee Intervenors assert that the district court's task was to find that it was more probable than not that the revised plan would *not* result in reduced African-American voting strength. 42 U.S.C. § 1973c.

due to the retrogressive effect that the first Senate plan had on the effective franchise rights of minority voters.[27]

B. Application Of This Court's Section 5 Retrogression Standard Did Not "Impose A One-Way March Towards Maximization"

Appellant's argument that the district court's opinion results in a ratcheting up "whereby Georgia loses its authority to make reasonable redistricting choices" has no basis. (J.S. 25). The district court did not prohibit reasonable choices by Appellant, just retrogressive ones.

Section 5 plainly does not require the maintenance of any specific minority percentages in districts. Demographic changes might permit a state to change its reapportionment plan substantially, including reducing BVAP or BPOP levels in black majority districts, when evidence shows that the percentage of minority population in the state or a specific area has decreased. *See City of Richmond*, 422 U.S. at 372. This is not the case in Georgia, however, where the percentage of minority voting age population has increased since the last census.[28] Moreover, if political racial polarization and racial bloc voting were to disappear or decrease, a jurisdiction might be able to prove that a new plan with significantly diminished majority-minority districts would not retrogress the position of racial minorities with respect to the effective exercise of their

27. Appellee Intervenors note that Appellant intentionally engaged in this retrogression, constituting another basis for affirming the district court's decision. *See Garza v. Los Angeles County Bd. Sup.*, 918 F.2d 763 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028 (1991).

28. In 1990, according to the United States Census Bureau, the black proportion of the total population was 27.0%; by 2000 this proportion had increased to 28.7%, a 6.3% gain. In 1990, the black proportion of the voting age population was 24.6%; by 2000 this proportion had increased to 26.6%, an 8.1% gain. *U.S. Census of Population and Housing, 2000: Redistricting Data Summary File, Tables PL1 and PL4: Georgia* (U.S.: Government Printing Office 2001).

electoral franchise.[29] Appellant, however, not only failed to carry its burden of proof on these issues in this case, it failed to make any significant evidentiary presentations on them.

Furthermore, Appellant's contention that the district court's opinions lead to a "once a majority-minority district, always one but always stronger" scenario does not play out. For example, if the minority population grows in a district which was not a majority-minority district under the benchmark, that district might become near majority-minority or a true majority-minority district under the next redistricting plan. Likewise, a near majority-minority district might become a true majority-minority district over a decade. Finally, if the nonminority population grows in a district, as is the case in many coastal areas as well as some urban areas of Georgia, the benchmark voting strength in the district may decrease. The demography of a state's districts is dependent upon normal growth patterns that occur in individual locations. The purpose of using the most recent census to create the benchmark is to stymie the habit of jurisdictions of continually fracturing minority communities so that those communities can never grow into majority-minority districts or become "safe seats."

The first Senate plan defied the natural growth patterns of the minority community. While the proportion of black voting age population had increased over the decade, Appellant attempted to minimize the effect of that growth by ignoring the benchmark numbers. The very purpose of analyzing the benchmark plan using the current census data is to prevent a covered jurisdiction from doing exactly what

29. Additionally, if racial polarization in a jurisdiction diminishes sufficiently, Congress recognized that a state should have the ability to remove itself from Section 5's remedial provision. Congress enacted a specific provision, renewed in 1982, for jurisdictions to remove themselves from the preclearance requirement. 42 U.S.C. § 1973b(a)(1). In lieu of taking this "bail out" route, Appellant asks this Court to remove it from Section 5 compliance by judicially reversing its traditional interpretation of Section 5.

Appellant sought to do here—use redistricting as a way to suffocate a growing minority population in a discrete geographic area which has become, or is becoming, the majority voting age population in a district. A district which was originally a marginal majority-minority district but which has grown into a safe district over the decade should not have a "point of equal opportunity" racial quota applied to it that requires the district to be restructured in a geographically tortured fashion in order to retrogress minority voting strength to a marginal level.[30]

In summary, there can be no doubt that the retrogression test enunciated in *Beer* and applied by the district court is constitutional. There are no facts in this case that call the retrogression test into constitutional question. The district court's opinion correctly determined that when Appellant failed to establish the absence of a retrogressive effect, especially in the face of evidence that such an effect existed, Appellant was not entitled to preclearance of its first Senate plan. There is nothing unconstitutional in that conclusion.

The only constitutional violation in the first Senate plan, and in the revised Senate plan, is entirely of Appellant's making and, surprisingly, acknowledged by Appellant. Although Appellant announced many times that its intent was to maximize Democrat political performance, Appellant now acknowledges that its own goal may be constitutionally infirm: "Guaranteeing a particular political result is not a

30. The Senate Committee on the Judiciary recognized as much when, recommending a 25-year extension of Section 5, the Committee found that, "[t]he departure from past practices as minority voting strength reaches new levels . . . serves to underline the continuing need for Section 5." S. Rep. No. 97-412, 2d Sess. (1982). In short, as minority voting strength has increased to effective levels, it was even more important to Congress that Section 5 be honored. In Georgia, such strength has increased to effective levels in the benchmark majority-minority districts. Because that effectiveness interfered with Appellant's political goals, however, Appellant set about dismantling the districts. Such conduct on the part of a covered state is exactly what Congress intended to prevent in extending the life of Section 5.

constitutionally legitimate goal." (J.S. 25). Thus, while the plans may suffer constitutional infirmity because they were drawn to "guarantee" the success of the Democratic Party, in particular white Democrats, the plans are not constitutionally infirm because they were made to comply with Section 5.

III. SECTION 5 DID NOT PRECLUDE THE DISTRICT COURT FROM APPLYING FEDERAL RULE OF CIVIL PROCEDURE 24 TO PERMIT INTERVENTION BY INTERESTED MINORITY VOTERS

Private parties have routinely intervened in declaratory judgment actions brought pursuant to Section 5 since the infancy of the Voting Rights Act. In fact, as litigation under the Act has progressed, a strong tradition has emerged of private parties participating in, and bringing value to, Section 5 actions for declaratory judgment. Indeed, of the approximately 35 instances in which Section 5 preclearance was sought from the United States District Court for the District of Columbia (rather than administratively), private parties were allowed to intervene in approximately 30 cases. Despite this history and the obvious interests that individual minority voters have in maintaining their ability to elect candidates of their choice, Appellant makes the curious argument, completely unsupported by authority, that the Attorney General is the "sole statutorily designated defendant" in a Section 5 judicial action and that all private parties are prohibited from intervening in such actions. (App. Brief, p. 40). Appellant's arguments are specious.

A. Private Party Intervention In Section 5 Declaratory Judgment Actions Is Governed By Federal Rule Of Civil Procedure 24 And Recognized As Valuable In The Court's Jurisprudence

"Intervention in a federal court suit is governed by Fed. Rule Civ. Proc. 24." *NAACP v. New York*, 413 U.S. 345, 365 (1973). Not a word in the Voting Rights Act hints that Section

5 declaratory judgment actions are exempt from the Federal Rules of Civil Procedure. In one of the earliest cases examining whether private parties may intervene as defendants in declaratory judgment actions brought by states or political subdivisions for preclearance under the Act, the United States District Court for the District of Columbia recognized that nothing in the Act transmutes the purview of Rule 24:

> We are being asked to enter a judgment declaring the existence of a state of facts. . . . We see no basis for supposing that Congress meant to strip the court of its customary authority to permit intervention deemed helpful by the court. In our view the court has discretionary authority to permit intervention by applicants offering to provide evidence or argument concerning the facts the court must determine in arriving at its declaratory judgment.

Apache County v. United States, 256 F. Supp. 903, 908 (D.D.C. 1966) (Section 4 declaratory judgment action).[31] *See also Texas v. United States*, 802 F. Supp. 481, 482 n.1 (D.D.C. 1992) (applying Rule 24(b) to permit intervention of private parties in Section 5 declaratory judgment action).

Since that time, while not addressing the issue expressly,[32] this Court has implicitly recognized the role that interested private party intervenors are entitled to play in

31. Contrary to Appellant's representation, *Apache County* did not deem "intervention inappropriate because of the Attorney General's unique statutory role." (App. Brief, p. 41). Rather, *Apache County* applied Rule 24 and explicitly rejected the argument made now by Appellant that "the spirit of the 1965 Act excludes intervention by private parties under any circumstances." *Apache County*, 256 F. Supp. at 907.

32. Presumably, the Court has never been asked to opine on the applicability of Rule 24 to Section 5 declaratory judgment actions because the applicability is self-evident.

Section 5 declaratory judgment actions. For example, in *City of Richmond*, private party intervenors were allowed to pursue a Section 5 preclearance action independently when they opposed a consent judgment improperly entered into by the City and the Attorney General. 422 U.S. at 366-67. A year later, in *Beer*, 425 U.S. at 142 n.13, Justice Stewart, writing for the Court, relied upon voter registration statistics provided by private party intervenors in analyzing the retrogressive effect of a proposed plan. Justice Marshall also extensively quoted the argument of private party intervenors in his dissenting opinion. *Id.* at 161 (Marshall, J., dissenting). This Court also has recognized the presence of intervenors in *United States v. Mississippi*, 444 U.S. at 1051 (Stevens, J., concurring); *City of Lockhart v. United States*, 460 U.S. 125, 129 (1983); and, in its most recent Section 5 action, *Bossier Parish II*, 528 U.S. at 323. In this tradition of allowing private party intervenors, the Court has implicitly acknowledged not only the applicability of Rule 24 to Section 5 cases, but also the significant value that intervenors bring to such actions.[33]

Appellant boldly, but incorrectly, asserts that Section 5 provides for the Attorney General "as the sole statutorily designated defendant" in a civil action for preclearance. (App. Brief, p. 40). To the contrary, Section 5 makes no mention of the appropriate defendants in such a declaratory judgment action. Nothing in the Voting Rights Act can be read to abrogate the discretionary authority possessed by the district court to permit intervention under Federal Rule of Civil Procedure 24 when a jurisdiction pursues judicial, rather than administrative, preclearance.

The cases cited by Appellant also fail to support the argument that private party intervention is impermissible in a Section 5 declaratory judgment action. The first case

33. As discussed below, minority voters possessing first-hand knowledge about the political implications of proposed plans and having distinct interests in seeing that their rights are not retrogressed bring a different perspective to declaratory judgment actions than does the Attorney General.

cited by Appellant for this proposition, *Morris v. Gressette*, 432 U.S. 491 (1977), is wholly inapposite. In *Morris*, South Carolina pursued preclearance *administratively*, rather than in a declaratory judgment action. *Id.* at 501. When the Attorney General failed to object to the plan, private individuals brought suit in federal district court, as plaintiffs, challenging the Attorney General's actions. On appeal, the issue before the Court was whether district courts have the authority to review action by the Attorney General in administrative preclearance cases. After discussing the two distinct Section 5 avenues of preclearance, the Court concluded that because administrative preclearance is intended to be an "expeditious alternative to declaratory judgment actions," judicial review of the Attorney General's administrative decisions is not allowed. *Id.* at 504. *Morris* did not address the issue of intervention rights of private parties in Section 5 declaratory judgment actions; instead, the Court simply held that neither the plaintiffs, nor anyone else, could file litigation to challenge administrative preclearance.

Next, Appellant contends that in *Brooks v. Georgia*, 516 U.S. 1021 (1995), the Court summarily affirmed the district court's denial of private party intervention. The district court decision that the Court summarily affirmed, *Georgia v. Reno*, 881 F. Supp. 7 (D.D.C. 1995), however, contains absolutely no mention of intervention, let alone a discussion of the reason that intervention was denied. As there is no indication that the Court was even aware that private persons had sought to intervene in the case below, the Court's summary affirmation cannot be read to indicate that the Court has reversed its long-held position permitting intervention in Section 5 cases.[34]

34. Indeed, by Appellant's reasoning, the Court's summary affirmation of *City of Petersburg, Virginia v. United States*, 354 F. Supp. 1021 (D.D.C. 1972), *summ. aff'd*, 410 U.S. 962 (1973), and *Busbee v. Smith*, 549 F. Supp. 494 (D.D.C. 1982), *summ. aff'd*, 459 U.S. 1166 (1983), both cases in which the district court permitted intervention in Section 5 preclearance actions, suggests that intervention of interested parties *is* permissible.

Appellant's contention that the Court "upheld denial of intervention in a § 4 action" in *NAACP v. New York*, 413 U.S. 345 (1973), is also misleading. (App. Brief, p. 42). In that case, the Court specifically recognized that private party intervention in Voting Rights Act declaratory judgment actions is permissible under Federal Rule of Civil Procedure 24. *NAACP*, 413 U.S. at 365. Reviewing the district court's denial of intervention for abuse of discretion, however, the Court determined that the district court did not abuse its discretion when the Rule 24 motion to intervene was untimely. *Id.* at 367-69. The Court noted that no unusual circumstances warranted an exception to Rule 24's time requirements because no appellant alleged an injury from the Voting Rights Act violations asserted therein. *Id.* at 368. In the present case, there is no dispute that Appellee Intervenors' Rule 24 application was timely[35] or that Appellee Intervenors will sustain injury if forced to vote in districts that retrogress their voting power.

Appellant's argument that private party intervention should further be precluded as a matter of course because the presence of private parties prolongs the length of declaratory judgment trials rings hollow. First, any state or political subdivision truly concerned about the possible delay that might arise from a declaratory judgment action has the option of pursuing preclearance administratively. As the Court recognized in *Morris*, the legislative history of Section 5 indicates that the administrative preclearance option was added to the Act specifically to address timing concerns by providing a "speedy alternative method of compliance." *Morris*, 432 U.S. at 503.[36] Second, any potential

35. Appellee Intervenors filed their motion to intervene on November 16, 2001, at a time when the only activities that had occurred in the case were purely procedural: the Attorney General's counsel had filed an entry of appearance and the court had requested the Chief Judge of the Circuit to appoint two other judges to the three-judge panel.

36. In this case, had Appellant truly been concerned about the delay that preclearance might have on the finalization of reapportioned voting

(Cont'd)

delay that might arise from the presence of additional parties in a declaratory judgment action can be curtailed by the district court's exercise of its inherent authority to control its docket. In this action, the presence of intervenors did not prolong the length of the declaratory judgment proceedings because the district court ordered the intervenors to comply, and the intervenors did comply, with the schedules set for the other parties.[37]

Finally, contrary to Appellant's assertion, the presence of intervenors here did not expand the scope of the litigation or prevent the district court from entering a consent decree had the Attorney General and Appellant reached an accord as to a particular plan. Rather, as discussed previously in a preclearance action, the submitting jurisdiction bears the burden of proving that each plan submitted for review does not have the purpose, and will not have the effect, of abridging or denying the right to vote on the basis of race or color. 42 U.S.C. § 1973c; *see also Bossier Parish I*, 520 U.S. at 480. When the plans are submitted to the DOJ for preclearance, the submitting jurisdiction must prove its case to the satisfaction of the DOJ. However, when the plans are submitted to the district court, the submitting jurisdiction must prove its case to the satisfaction of the court.

(Cont'd)
districts, Appellant would have passed redistricting plans and initiated the preclearance process much earlier than it did. Although the 2000 census numbers were released in March 2001, the General Assembly did not even meet to consider redistricting until August 2001 and did not enact the plans until mid August and late September 2001. (J.S. 45a). Appellant chose to wait for enactment of all three plans before filing the declaratory judgment action in October 2001. (J.S. 27a, 45a).

37. In supporting the intervention of minority citizens affected by the proposed changes in the voting laws, the Attorney General agreed that intervention would neither delay nor disrupt the proceeding: "The United States does not believe that intervention by the movants at this time would unduly delay or disrupt this action, so long as the movants are required to meet the same schedules as the Plaintiff and the United States." (Int. Motion to Dismiss, p. 11a).

The district court correctly concluded that it had no authority to enter declaratory judgment for Appellant based solely on the DOJ's acquiescence in the proposed House and Congressional plans before Appellant had proven entitlement to that judgment. Appellant has not directly challenged this holding on appeal, presumably because it recognizes that its argument is foreclosed by the Court's decision in *City of Richmond*. In that case, after permissive intervention was granted to a group of minority citizens, a proposed consent decree between the City and the United States was presented to the trial court. 422 U.S. at 366. The intervenors objected, and the trial court set the case for a hearing on the merits before a special master. *Id.* Despite the United States' willingness to enter into a consent decree, the special master recommended that the trial court find that the City had not met its burden of proof. *Id.* The trial court followed the recommendation, and the annexation plan was rejected. *Id.* The City appealed. While the Court remanded the case for additional factual findings, *id.* at 378, the case makes clear that even upon the offering of a consent decree, a submitting jurisdiction is not relieved of its burden to make the requisite showing under Section 5 to the district court.

B. The District Court Correctly Applied Federal Rule Of Civil Procedure 24 In Permitting Intervention By Minority Voters With An Interest In Protecting The Value Of Their Votes

Federal Rule of Civil Procedure 24(a)(2) provides that a person

> *shall* be permitted to intervene in an action . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability

> to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(emphasis added).

Federal Rule of Civil Procedure 24(b)(2) provides that a person

> *may* be permitted to intervene in an action when an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(emphasis added).

Appellant asserts that Appellee Intervenors neither had an "interest" that may have been impaired such that intervention was required under Rule 24(a)(2), nor a "claim or defense" in common with the main action such that intervention was permissible under Rule 24(b)(2).[38] As recognized by Justice O'Connor's concurring opinion in *Diamond v. Charles*, 476 U.S. 54, 75-77 (1986), the "interest" requirement of Rule 24(a)(2) and the "claim or defense" requirement of Rule 24(b)(2) are closely related concepts. The Rule 24(a)(2) "interest" requirement calls for "a direct and concrete interest that is accorded some degree of legal protection." *Id.* at 75. The Rule 24(b)(2) "claim or defense" requirement calls for an "actual, present interest" that is "sufficient to support a legal claim or defense." *Id.* at 77. The significant interest of Appellee Intervenors in the effective exercise of their voting rights satisfies both the "direct and concrete" standard for intervention as of right

38. The district court did not explain whether it granted intervention as of right under Rule 24(a)(2) or permissive intervention under Rule 24(b)(2).

under Rule 24(a)(2) and the "actual and present" standard for intervention by permission under Rule 24(b)(2).

The Voting Rights Act was enacted in 1965 to "attack the blight of voting discrimination across the Nation." *Bossier Parish I*, 520 U.S. at 476 (citing S. Rep. No. 97-417, 2d Sess. (1982) (internal quotation omitted)). To that end, Section 5 was promulgated "to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer*, 425 U.S. at 141. Given its important but limited purpose, Section 5 was only made applicable to jurisdictions with a history of discriminatory voting practices, such as Georgia.

Appellee Intervenors are African-American registered voters of Georgia with a direct interest in the creation of nondiscriminatory redistricting plans. All pay taxes in Georgia, work in Georgia, drive on Georgia roads, and perform numerous other daily activities in Georgia that are influenced by Georgia elected officials. All have a direct, concrete interest in ensuring that their ability to elect candidates of their choice, candidates who will have an effect on their daily lives, is not diminished.[39] It is these voting rights of minority citizens, the "most basic of political rights," *Federal Election Commission v. Akins*, 524 U.S. 11, 24-25 (1998), that Section 5 was implemented to protect. Appellee Intervenors are directly affected by the preclearance of a retrogressive plan. They have a right to have their votes count, and this right is protected by Section

39. While the Attorney General has a general interest in enforcing the laws promulgated by Congress, he does not have the type of direct interest shared by the Appellee Intervenors in this case. He does not intimately know the interests of minority voters in Georgia. For this reason, minority voters in covered jurisdictions bring unique perspectives to preclearance actions. For example, minority citizens standing on the streets of Savannah will likely have a different view of the effect that changes in voting precincts have on the voting power of minority citizens in Georgia than will the Attorney General standing on the streets of Washington, D.C.

5. Appellant has cited no authority that such a monumental interest is insufficient to entitle Appellee Intervenors to have a presence in an action brought under the precise Act which protects that interest.

To hold otherwise would create a vast inconsistency in preclearance actions, dependent upon which of the two preclearance routes a jurisdiction pursues. When a jurisdiction pursues administrative preclearance, private citizens are permitted to make comments and present evidence on retrogression, and the decisionmaker (the DOJ) is entitled to rely on that information in deciding whether or not to preclear a proposed plan. When a jurisdiction pursues judicial preclearance, private citizens should similarly be permitted to make comments and present evidence on retrogression, and the decisionmaker (the district court) should be entitled to rely on that information in deciding whether or not to preclear a proposed plan. A ruling that citizens, particularly minority citizens, have no right to participate in a Section 5 proceeding if the submitting jurisdiction elects to file a declaratory judgment action in lieu of an administrative proceeding would effectively enable a jurisdiction to silence opposition to the proposed change.

Appellant also asserts that, even if Appellee Intervenors have a direct and concrete "interest," Rule 24(a)(2) does not support intervention because that interest would not be "impaired or impeded" by denial of intervention. Appellant appears to be arguing that Appellee Intervenors could protect their interests by bringing a Section 2 action following preclearance. This argument fails to recognize the distinct standards and remedies that distinguish Section 5 from Section 2. *See Bossier Parish I*, 520 U.S. at 477. "The two sections differ in structure, purpose and application." *Holder*, 512 U.S. at 883. Section 5 was enacted as "a response to a common practice in some jurisdictions of staying one step ahead of the federal courts by passing new discriminatory voting laws as soon as the old ones had been

struck down." *Beer*, 425 U.S. at 140 (citing H.R. Rep. No. 94-196, pp. 57-58 (1970)). With Section 5, Congress shifted "the advantage of time and inertia from the perpetrators of the evil to its victim by freezing election procedures in the covered areas unless the changes can be shown to be nondiscriminatory." *Id.* (internal quotation omitted). Section 5 thus focuses on "freezing election procedures" and imposes a burden on the covered jurisdiction to prove that the changed redistricting plan, as a whole, does not have the purpose or effect of retrogressing minority voting power. *Id.* at 141.

Section 2, on the other hand, does not include a retrogression inquiry. *Holder*, 512 U.S. at 884. Rather, it considers only whether a voting practice is discriminatory. In a Section 2 action, the burden is placed on the minority voter to establish that: (1) the minority group could constitute a majority in a single member district; (2) the minority group is politically cohesive; and (3) the white majority votes as a bloc to defeat the minority group's candidates of choice. *Id.* at 479. Thus, a Section 2 action, both in procedural respects (such as the shifted burden of proof) and in the interest that it is designed to protect, is not an appropriate substitute for Appellee Intervenors' right to participate as a party in a Section 5 action. Appellee Intervenors' ability to oppose the imposition of a plan that retrogresses their voting rights clearly would have been "impaired or impeded" had the district court denied intervention. Thus, Appellee Intervenors had a right to intervene in the declaratory judgment action pursuant to Rule 24(a)(2).

Finally, Appellant appears to argue that even if Appellee Intervenors had an "actual, present interest" such as to meet the requirement of a Rule 24(b)(2) "claim or defense," Rule 24(b)(2) would not permit intervention because Appellee Intervenors' claim or defense does not have a "question of law or fact in common" with the main action. This argument is completely untenable. The question in the

main action was whether Georgia's newly passed redistricting plans for the State House, State Senate, and Congress were retrogressive of minority voting strength. In their answer, Appellee Intervenors objected to Georgia's proposed plans because those plans result in a retrogression in minority voting strength. Because the weakening of minority voting strength was the issue in both the main action and the focus of Appellee Intervenors' answer, the two indisputably had a question in common. Thus, intervention was clearly appropriate under Rule 24(b)(2).

CONCLUSION

For the foregoing reasons, Appellee Intervenors respectfully request that the Court affirm the decision of the district court.

Respectfully submitted,

FRANK B. STRICKLAND
ANNE W. LEWIS
STRICKLAND BROCKINGTON LEWIS LLP
Suite 2000
1170 Peachtree St., N.E.
Atlanta, GA 30309
(678) 347-2200

E. MARSHALL BRADEN*
AMY M. HENSON
BAKER & HOSTETLER LLP
Suite 1100
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 861-1500

* *Counsel or Record*

Attorneys for Appellee-Intervenors
Patrick L. Jones, Roielle L. Tyra,
Georgia W. Benton, and Della Steele

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IN THE

Supreme Court of the United States

STATE OF GEORGIA,
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v.

JOHN ASHCROFT, *et al.*
Appellees,

and

PATRICK L. JONES, *et al.*
Intervenors.

On Appeal from the United States District Court for the District of Columbia

REPLY BRIEF OF THE STATE OF GEORGIA

THURBERT E. BAKER
Attorney General of Georgia
DENNIS R. DUNN
Deputy Attorney General
THOMAS SAMPSON, SR.
THOMAS, KENNEDY, SAMPSON & PATTERSON
Atlanta, Georgia
* Counsel of Record

MARK H. COHEN
TROUTMAN SANDERS LLP
Atlanta, Georgia
DAVID F. WALBERT *
PARKS, CHESIN & WALBERT, P.C.
26th Floor, 75 Fourteenth Street
Atlanta, Georgia 30309
(404) 873-8000
Special Assistant Attorneys General

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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IN THE

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No. 02-182

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REPLY BRIEF OF THE STATE OF GEORGIA

ARGUMENT

I. APPELLEES OFFER NO ARGUMENT IN SUPPORT OF THE CONSTITUTIONALITY OF SECTION 5 AS CONSTRUED BY THE DISTRICT COURT

With little exception, the briefs of both the federal appellees and the intervenors avoid the substantive legal issues before the Court. Appellees' inability to meet the constitutional issue presented by the lower court's interpretation of § 5 is especially glaring.

The district court held that Georgia is compelled by § 5 to redistrict in a way that will maintain a preexisting number of "safe" or "robust" seats, so long as demographics permit such lines to be drawn. The majority rejected Georgia's contention that districts were legally permissible under § 5, just as they are under § 2, if minorities maintained a "fair or equal opportunity" to win those districts. As Judge Edwards wrote in his opinion, joined by Judge Sullivan: "[A] state that converts a safe district into one where African Americans have only a 'fair opportunity'" runs afoul of § 5. (J.S. 152a). Because Georgia "merely" adopted "a plan that preserve[d] an 'equal or fair opportunity' for minorities to elect candidates of their choice," preclearance was denied. *Id.* 151a.

Both § 2 and § 5 of the Voting Rights Act derive their constitutional authority from the power of Congress to protect minority voters from discrimination. *Lopez v. Monterey County*, 525 U.S. 266 (1999); *Thornburg v. Gingles*, 478 U.S. 30 (1986); *City of Rome v. United States*, 446 U.S. 156 (1980); *South Carolina v. Katzenbach*, 301 U.S. 315 (1966). Here, however, the district court required Georgia to adopt a redistricting plan that went beyond the adoption of a *nondiscriminatory* plan, requiring instead the drawing of safe or "robust" seats. It is by this holding that the district court expanded § 5 beyond the parameters of the Constitution. The constitutional basis for § 5 would be lost if the statute were construed to mandate not only a nondiscriminatory redistricting scheme, but one that also includes safe minority districts. That is particularly true where the sole reason for requiring those safe seats is the mere fact that such high BVAP seats happen to have existed at the time of the 2000 census.

Appellees offer no hint of constitutional authority that might support such an expansive application of § 5. The DOJ's brief merely notes that § 5 has been previously upheld against a *general* challenge and then goes on to state that the issue "creates no constitutional concern." (DOJ Brief, p. 39).

The DOJ's inability to cite *any* authority for its position on this issue speaks volumes. Its silence follows inevitably from the fact that there is no such authority in this Court's prior decisions.

Intervenors similarly provide no constitutional support for the district court's construction of § 5. Neither do they offer any reason why this Court should adopt such a radical interpretation of the Constitution.

II. THE DISTRICT COURT'S INTERPRETATION OF SECTION 5, REQUIRING GEORGIA TO DRAW SAFE MINORITY SEATS, IS INCONSISTENT WITH THIS COURT'S PRIOR DECISIONS.

A. Appellees Offer no Authority for Interpreting Section 5 as the District Court Did Here.

The Attorney General contends that the "district court in this case broke no new ground." (DOJ Brief, p. 20). In truth, what the district court required of Georgia is unprecedented. Never has this Court required that a jurisdiction draw *safe* seats—or *robust* seats—in any context. Safe minority seats have not been required as a remedy in litigation; they have not been required by any constitutional principle; they have not been required under § 2 of the Voting Rights Act; and they have not been required under § 5 of the Voting Rights Act. *See, e.g., Bush v. Vera*, 517 U.S. 952 (1996); *Johnson v. DeGrandy*, 512 U.S. 997 (1994); *Thornburg v. Gingles*, 478 U.S. 30 (1986); *Beer v. United States*, 425 U.S. 130 (1976). Moreover, in those instances where states have enacted redistricting plans to create safe districts, this Court has

stricken such plans as unconstitutional.[1] *Bush v. Vera*, *supra*; *Miller v. Johnson*, 515 U.S. 900 (1995).

For appellees to suggest that the holding of the majority below is in line with this Court's voting rights jurisprudence simply ignores this Court's decisions. Requiring Georgia to draw safe minority seats stretches § 5 to a new and unprecedented extreme that is divorced from the goal of interracial politics that underlies the Voting Rights Act. *See Johnson v. DeGrandy, supra*. The district court's interpretation of § 5 unavoidably raises a substantial constitutional question, which alone is a compelling reason to reject its construction of the statute:

> When the validity of an act of Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided. *Crowell v. Benson*, 285 U.S. 22, 62 (1932).

This long-standing rule dictates reversal of the judgment below and adoption of Judge Oberdorfer's well-reasoned interpretation of § 5.

Appellees' entire legal argument in support of the district court's ruling boils down to their incantation of the principle that § 5 is designed to avoid "retrogression." That argument is unavailing here, however, for several reasons, not the least of which is that requiring safe seats conflicts with everything this Court—and Congress—has previously written regarding the rights of minority voters to an *equal* opportunity to

[1] An integral part of those decisions, of course, was the finding that the district lines at issue were predominantly based on race. In this instance, the sole reason why Georgia's 2001 Senate plan was rejected by the court was race. The interim remedial plan adopted in 2002 to address the court's ruling was changed solely to increase the BVAPs in the original plan.

participate in the political process. Under this view of § 5, a state's redistricting prerogatives are defined largely by what districts happen to be in place at a given time, rather than what is or is not a discriminatory plan.

Appellees' argument also founders on its own self-contradictions. As the DOJ notes in its brief, the district court did not require that the very high existing BVAPs be maintained at the same levels in every district. (DOJ Brief, pp. 29-38). To the contrary, the court and the DOJ permitted BVAP reductions in many districts, so long as the likelihood of minority victory remained "robust." (*Id.* App. A). These reductions were often substantial, exceeding 10%, 20% and even 30% in districts with the highest minority populations. *Id.* Obviously, all of these district reductions had some adverse impact on the likelihood of a minority preferred candidate winning in those particular districts. Even in the complete absence of racially polarized voting—much less "severe" polarization—the likelihood of a minority preferred candidate winning inevitably decreases as the minority VAP decreases in the district.

The DOJ's acquiescence in the view that § 5 permits such reductions is not surprising. The only alternative—arguing that any BVAP reduction is illegal retrogression—is patently untenable. Under that view, there would be § 5 prohibited "retrogression" with a BVAP reduction from 85% to 60%[2] because that would necessarily cause some reduction in the likelihood of minority candidate victory.

By acknowledging that a substantial BVAP reduction can be enacted without violating § 5, appellees admit the very point they supposedly take issue with—namely, that some reductions in minority electoral control in majority-minority districts are permissible under § 5. Once acknowledging that

[2] This BVAP reduction occurred, for example, in H.D. 70. (DOJ Brief, App. A).

such reductions are permissible, appellees have stepped onto the slippery slope. The issue is not whether *any* decrease in minority voting strength is permitted in majority-minority districts. The real issue is how much minority control must be maintained in order to satisfy § 5. Under the district court's safe seat/robust seat threshold for § 5 retrogression compliance, the opportunity for minority victory can be reduced from certainty to a point where a district appears safe, or robust. But it cannot be reduced to the point where minorities have an equal opportunity.

By drawing the line at the safe/robust seat threshold, the district court has picked an arbitrary point on the continuum of likely electoral success. And by taking this approach—rather than adopting a strict "no reduction" interpretation of § 5—the court and appellees endorse the same conceptual approach to applying § 5 to redistricting plans as the State of Georgia advocates. The only difference is where the line is drawn for minority electoral strength, below which there is illegal retrogression.

The district court's picking of the safe seat point of political strength is completely arbitrary. It has no precedent in the case law and none in the statute. Moreover, appellees' construction of § 5 would place that statute at odds with § 2. In the context of redistricting plans, it is well settled that § 2 requires only the adoption of nondiscriminatory plans that provide equal opportunity at electoral victory and equal access to the political process. *Johnson v. DeGrandy, supra*; *Thornburg v. Gingles, supra*.

Appellees provide no rationale that would justify construing the substantive dictates of § 5 more broadly than those of § 2. If anything, the opposite should be the case because of the limited purpose of § 5. *See, e.g., Reno v. Bossier Parrish*, 528 U.S. 320 (2000); *Beer v. United States*, 425 U.S. 130 (1975). While § 2 and § 5 have different procedural reach, § 5 should not be construed to impose

broader *substantive* restrictions on a state's redistricting prerogatives than § 2.

B. The Other Assertions Advanced by Appellees Provide no Support for the District Court's Holding.

Several of appellees' other points will be addressed briefly here.

The relationship between § 2 and § 5. This Court has held that a covered jurisdiction need not prove compliance with § 2 in order to receive § 5 preclearance. *Reno v. Bossier Parrish School Bd.*, 520 U.S. 471 (1997). From this, appellees incorrectly contend that it is irrelevant that Georgia enacted nondiscriminatory redistricting plans in 2001. (DOJ Brief, pp. 21-28). Appellees misapply this Court's holding in *Bossier Parrish*. Nothing this Court said there implies that § 5 can prohibit the adoption of a nondiscriminatory election plan.

The benchmark districts. The DOJ obfuscates the issues before the Court by suggesting that the State and Judge Oberdorfer seek to compare Georgia's new 2001 redistricting plan with some "hypothetical" plan, rather than with the pre-existing "benchmark." (DOJ Brief, pp. 27-28). That is incorrect. Since the complaint was first filed in this case, Georgia has recognized that the newly enacted redistricting plans must be compared to the existing ones under § 5. What Georgia has contended is that the legality of the new plan should look to whether the preexisting minority electoral opportunities were preserved at a legally satisfactory level. Appellees and the district court do the very same thing. They would simply draw the line below which a minority-majority district cannot fall at a higher level—specifically, the safe seat threshold.

The elimination of preexisting majority black districts. The DOJ asserts that the district court's ruling permits the elimination of majority black districts "based on proof that the dispersion of black voters would increase black electoral strength in other districts." (DOJ Brief, p. 35). All that statement means, however, is that a given safe seat can be eliminated *if* another one is created elsewhere. While the district court did not hold that the same exact geographical areas must be configured into the same safe districts to avoid retrogression, it certainly did hold that the total number of safe districts cannot be reduced if it is demographically possible to maintain or increase the number of such districts.

Majority BVAP districts in Georgia. The DOJ's brief mistakenly asserts that one of the districts at issue fell slightly below 50.0% BVAP in the State's proposed plan. (DOJ Brief, p. 6 & n. 3, referring to S.D. 2). While the 0.2% difference is of little moment, the DOJ's factual assertion is contrary to the undisputed evidence. S.D. 2 was maintained as a majority-minority district, both by BPOP and BVAP.

The 2000 census was the first census that permitted respondents to self report as a member of more than one racial category. In its tabulation of the total BVAP, Georgia counted multiple race respondents who combined black with any other minority race as part of the BVAP or BPOP. Georgia adopted its practice only after the Director of its Reapportionment Office heard a presentation to this effect by Joseph D. Rich, Chief of the Voting Rights Section of the DOJ. (Meggers Depo., 1/3/2002, pp. 18-19). Georgia learned for the first time during this litigation that the DOJ now contends that a multiple-race responder is "black" for BPOP/BVAP purposes only if that person reported that he/she was black in combination with "white." If the responder claimed "black" in combination with any other race—be it Asian, American Indian, Chinese, etc.—the DOJ does not count them as "black."

When Georgia realized the DOJ would advocate this unorthodox counting technique in this case, the State retained as an expert Dr. Roderick Harrison, the former Chief of the Racial Statistics Branch of the U.S. Census Bureau. Dr. Harrison's report established, without contradiction, that Georgia's approach was correct and that the DOJ position was baseless, arbitrary and irrational.[3] As he concluded, in light of the "empirical evidence, it seems arbitrary and *ad hoc* to adopt the [DOJ] rule." (P. Ex. 26, p. 15). The district court never resolved this dispute nor addressed the fact that there was no evidence to support the DOJ's position. Instead, the majority simply stated that it would consider "all of the evidence," without saying which version was entitled to more weight or providing any other clarification. (J.S. 117a). In fact, the evidence is undisputed that Georgia's approach is appropriate. S.D. 2 was a majority-minority BVAP district as redrawn in 2001.

III. APPELLEES OFFER NO LEGAL BASIS FOR ALLOWING PRIVATE INTERVENTION IN A SECTION 5 PRECLEARANCE PROCEEDING.

A. The Issue of Intervention Remains a Present Dispute that Should be Decided by this Court.

The DOJ suggests that this Court should deem the issue of intervention "moot" and avoid it. (DOJ Brief, pp. 40-42). Intervenors, like the State of Georgia, believe that the issue is properly presented in this appeal and should be decided.

Intervention is not a moot issue here. Mootness generally refers to the absence of an Article III case or controversy that

---

[3] The DOJ did not, and could not, introduce any evidence in support of its approach. It simply sought to rely at trial on its purported "guidance" on tabulation of black population, a discussion that was ambiguous in its own right. As Georgia argued below, the DOJ's "guidance" had never even been subjected to notice and comment under the APA. *See* Georgia's Post-Trial Findings of Fact, pp. 216-21.

arises during the course of litigation because a party has obtained the relief it sought, has abandoned its claim, or the like. *See generally Honig v. Doe*, 484 U.S. 305, 317 (1988); *Friends of the Earth, Inc. v. Ladlaw Environmental Services (TOC), Inc.* 528 U.S. 167, 189-90 (2000). Nothing about the present case is "moot." The State of Georgia is involved in an active controversy with the Attorney General, and the State is equally involved in a *present* dispute with the intervenors. Substantively, the scope of the dispute between Georgia and the intervenors is exactly the same as the State's dispute with the Attorney General precisely because the district court allowed these private intervenors to carry the same mantle of authority as the Attorney General. The dispute between the State and the intervenors is no more "moot" than is the dispute between Georgia and the Attorney General himself.

The vitality of the ongoing dispute between intervenors and the State of Georgia is apparent not only from their opposing positions on the substantive issues in this case, but from the prior history of this case as well. As noted previously, intervention in the district court prevented any meaningful opportunity for settlement, and it even prevented the district court from entering a consent order regarding the redistricting plans for Congress and the Georgia House of Representatives to which the DOJ had no objection. (Georgia Brief, pp. 42-43). The posture of the case today is the same. There is always the possibility of settlement of a case, even when it is on appeal. But here, the continued presence of the intervenors makes that impossible today, just as it did in the district court.[4] Similarly, while Georgia believes that the

[4] In addressing the continuing impact of intervention in this case, Georgia does not mean to suggest that there is an immediate likelihood of settlement between the original parties if there were no longer intervenors. To the contrary, settlement was never discussed after it became clear in the trial court that a settlement could not occur so long as the intervenors were present.

judgment in the district court should be reversed outright, the continued presence of the intervenors in the event the case were remanded to the district court for any purpose would present an ongoing controversy over the propriety of intervention itself.

While this Court has on many occasions articulated jurisprudential considerations that counsel against reaching issues that are not necessary to a decision, those considerations do not apply here. *See, e.g., Ashwander v. TVA*, 297 U.S. 288, 342-49 (1936) (Brandeis, J., concurring). Moreover, practical considerations weigh heavily in favor of deciding the issue of intervention. For years, § 5 intervention has been decided differently by different panels of the District of Columbia District Court. *See, e.g., State of Georgia v. Reno*, 881 F.Supp. 7 (D.D.C.), *aff'd sum.*, 516 U.S. 1021 (1995)(denying intervention). The issue of intervention was even decided differently at different times by the district court here. (Georgia Brief, pp. 41-42).

Very few § 5 preclearance actions are brought in the District of Columbia because of the tremendous expense involved in the prosecution of such actions. Deterred by the cost of litigation, jurisdictions frequently acquiesce in whatever the Attorney General rules in an administrative submission. A substantial part of the cost concerns of covered jurisdictions (which include hundreds of local governmental bodies that have serious financial constraints) is the fear that intervenors will expand the proceedings beyond what the Attorney General himself might assert, just as occurred here. The issue of private intervention in § 5 proceedings is an issue that should be resolved, and it is properly presented in this case.

B. Private Intervention is Plainly Inappropriate in a Section 5 Action.

Appellees' briefs confirm that private intervenors have no legally cognizable right or interest that could be impaired by the disposition of this case. Intervenors simply state that they have a "significant interest" in the preclearance of the election districts, as if their invoking the phrase suffices. Intervenors ignore the essential fact, however, that they have no legal right or private interest in a § 5 proceeding. What federal rights they may have to challenge voting practices derive from the Constitution and § 2 of the Voting Rights Act. A successful § 5 action impairs no rights of would-be intervenors:

> Neither an affirmative indication by the Attorney General that no objection would be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. 42 U.S.C. §1973c.

Intervenors cite several voting cases in which parties appeared as intervenors, but it appears that in most, if not all of those cases, intervention was not even a contested issue. Moreover, in each of those cases, there had been district court challenges in the respective states that preceded the applicants' intervention in the § 5 cases. Arguably, those intervenors might have had some "legal interest" arising from their other litigation.[5] More fundamentally, however, § 5

[5] *See, e.g., City of Richmond v. United States*, 422 U.S. 358, 364-65 (1975) (intervenor had twice challenged the legality of the city's proposed annexation prior to Richmond's preclearance action); *United States v. Mississippi*, 444 U.S. 1050, 1051 (1980) (intervenors were parties to a prior challenge pending in Mississippi); *Beer v. United States*, 374 F.Supp. 363, 367 n.5 (D.D.C. 1974) (intervenors were plaintiffs in a pending constitutional challenge to the same districts); *City of Lockhart v. United States*, 460 U.S. 125, 129 (1983) (intervenors had prior pending litigation challenging the city's plan and successfully enjoined the use of the voting change at issue in the preclearance action).

preclearance proceedings are uniquely inappropriate for private intervention. Section 5 is the most extreme intrusion into state prerogatives that has been enacted by Congress and upheld by this Court in over 100 years. Transferring the power to oppose a covered jurisdiction's declaratory judgment action from the Attorney General to a handful of private persons cannot be squared with the unique purposes of the statute. *See Morris v. Gressette*, 432 U.S. 491 (1977).

The court's expansive view of its own role, as well as that of intervenors, is not only inconsistent with § 5. It also conflicts with the way civil actions proceed in the district courts generally. Where a defendant—here, the Attorney General—takes no issue with the claims or assertions of a plaintiff, judgment on those claims in favor of the plaintiff is appropriate. The district court refused to follow that normal procedure here, however, and instead took on a much broader role:

> [T]he Attorney General has not objected to two of three redistricting plans proposed by the State of Georgia, and yet the State has come to this court seeking judicial—and not administrative—preclearance of all three plans. The United States and intervenors argue that the United States' failure to object to the two plans does not justify entry of declaratory judgment because the State retains the burden of proof and because the objections of intervenors preclude entry of a declaratory judgment . . . . In asking this court to enter a declaratory judgment as to all three plans, it imposes on this court an affirmative duty to inquire whether the plans have the effect or purpose of denying or abridging the right to vote on account of race or color. Furthermore, the State assumes the burden of demonstrating by a prepon-

derance of the evidence that such a declaratory judgment is warranted.

* * * *

The State cannot point to the Attorney General's apparent acquiescence—a circumstance relevant under the statute when administrative preclearance is sought—to justify a grant of judicial preclearance . . . .

* * * *

Indeed, the very structure of the declaratory judgment procedure, under which the Court, and not the Attorney General, is vested with the final authority to approve or disapprove the proposed change as a whole, argues conclusively against the State's suggestion. (J.S. 103a-106a).

The district court's approach would rewrite § 5 in a way that only Congress might do. Indeed, where Congress has intended that a district court should go beyond the contentions and admissions of the Attorney General and the opposing party and embark on a broader inquiry, Congress has explicitly stated exactly that and provided for intervention as a means for opposing a proposed consent judgment. An example of that type of procedure is the 1974 amendment to the antitrust laws which rewrote the normal procedures for entering consent judgments to allow for the kind of broad review and public participation the district court assumed here. *See* 15 U.S.C. § 16(b)–(f). Under the antitrust statute, proposed consent judgments are subjected to public comment. The trial court is then charged with making an *independent* determination of whether the proposed judgment "is in the public interest," and certain considerations the court should address are specified in the statute. 15 U.S.C. § 16(e). Congress further authorized the district court to appoint a special master or permit "participation in proceedings before the court by interested persons," including participation by way of "intervention as a party." 15 U.S.C. § 16(f).

Here, the district court proceeded as if Congress had provided a similar charge to look beyond the contentions and admissions of the State and the Attorney General, but § 5 provides nothing of the sort. Had Congress intended that preclearance actions proceed in the manner assumed by the lower court, Congress would surely have stated that either when it enacted § 5 or when it extended the law in 1970, 1975, or 1982—just as Congress so stated when it amended the antitrust laws. Undeterred by the absence of congressional authority in this case, the district court allowed intervenors to take over the role of the Attorney General even where he took no issue with Georgia's position.[6] Private intervention in § 5 actions is plainly inappropriate as a matter of law, particularly where the intervenors are allowed to expand the claims, issues and evidence defined and presented by the plaintiff and the Attorney General.[7]

---

[6] One might ask whether private intervenors could similarly trump the position of the Attorney General when he *disagreed* with the position of the covered jurisdiction—i.e. allow intervenors to acquiesce in preclearance over the Attorney General's opposition. There is no less reason to allow that to occur than what the district court permitted here.

[7] Intervenors take issue with Georgia's statement that *Apache County v. United States*, 256 F.Supp. 903 (D.D.C. 1966), held intervention inappropriate under § 4 of the Voting Rights Act because of the Attorney General's unique statutory role. (Intervenors' Brief, p. 38 n 31). However, that was the explicit rationale of the district court in denying intervention in that case. While the court did not state that intervention might never occur under the Voting Rights Act, the court reasoned that "the right enforced by [the statute] is a public right, appertaining not to individual citizens, but to the United States itself." *Id.* 906. Furthermore, *Apache* noted that the structure of § 5 makes preclearance proceedings even more inappropriate for private intervention because the Attorney General has the unrestricted power to preclear voting changes on his own. *Id.* 907-08.

CONCLUSION

For the foregoing reasons and the reasons set forth in appellant's principal brief, the State of Georgia respectfully requests that the Court reverse the April 5, 2002, judgment of the district court and direct that court to enter judgment preclearing the 2001 Senate plan at issue.

Respectfully submitted,

THURBERT E. BAKER
Attorney General of Georgia
DENNIS R. DUNN
Deputy Attorney General
THOMAS SAMPSON, SR.
THOMAS, KENNEDY, SAMPSON & PATTERSON
Atlanta, Georgia

MARK H. COHEN
TROUTMAN SANDERS LLP
Atlanta, Georgia

DAVID F. WALBERT *
PARKS, CHESIN & WALBERT, P.C.
26th Floor, 75 Fourteenth Street
Atlanta, Georgia 30309
(404) 873-8000

Special Assistant Attorneys General

* Counsel of Record

Supreme Court, U.S.
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and

PATRICK L. JONES, et al.,

Intervenors.

On Appeal from the United States District Court for the District of Columbia

Brief Amicus Curiae of Georgia Coalition For The Peoples' Agenda in Support of Appellees

LAUGHLIN MCDONALD
Counsel of Record
NEIL BRADLEY
BRYAN SELLS
MEREDITH E.B. BELL
American Civil Liberties
Union Foundation.
2725 Harris Tower
233 Peachtree Street
Atlanta, GA 30303
(404) 523-2721

BARBARA R. ARNWINE
THOMAS J. HENDERSON
ANITA HODGKISS
Lawyers' Committee for
Civil Rights Under Law
1401 New York Ave., N.W.
Suite 400
Washington, DC 20005
(202) 662-8600
(continued on back of page)

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38 pp

ELAINE R. JONES
Director-Counsel

NORMAN J. CHACHKIN
DEBO P. ADEGBILE
NAACP Legal Defense
and Educational Fund, Inc.
99 Hudson Street, Suite 1600
New York, New York 10013
(212) 219-1900

TODD A. COX
NAACP Legal Defense
and Educational Fund, Inc.
1444 Eye Street, N.W.
10th Floor
Washington, D.C. 20005
(202) 682-1300

Counsel for Amicus Curiae
Georgia Coalition For The
Peoples' Agenda

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Brief Amicus Curiae of Georgia Coalition For The Peoples' Agenda in Support of Appellees

INTEREST OF AMICUS CURIAE[1]

[1]No counsel for any party authored this brief in whole or in part, and no person or entity, other than amicus curiae, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been submitted to the clerk pursuant to Supreme Court Rule 37.3(a).

The Georgia Coalition For The Peoples' Agenda (GCPA) is an organized group of representatives from all of the major civil rights/human rights/peace & justice organizations and concerned citizens of the state of Georgia. Dr. Joseph E. Lowery is the Convenor of this coalition, whose members include: AFLCIO; Atlanta Millennium Section NCNW; Concerned Black Clergy; Ebenezer Baptist Church; Georgia Association of Black Elected Officials; Georgia Coalition of Black Women; Georgia NAACP; Juvenile Justice Task Force; Lindsay Street Baptist Church; Progressive Baptist Convention; Providence Baptist Church; RAINBOW/PUSH; Southern Christian Leadership Conference; and Trinity House. The mission of the coalition is (1) to improve the quality of governance in Georgia, (2) to help create a more informed and active electorate, and (3) to have responsive and accountable elected officials. Among its projects, GCPA has launched a massive statewide voter registration and mobilization crusade with a goal of registering 100,000 new voters. Central to the fulfillment of its mission is the adoption and maintenance of redistricting systems that do not lead to retrogression in minority voting strength and provide all voters of the state the equal opportunity to participate in the political process and elect candidates of their choice.

SUMMARY OF ARGUMENT

The State of Georgia's proposed "equal opportunity," or 50-50 chance of winning, standard for Section 5 preclearance would, if adopted, have a devastating impact on minority office holding and voting rights. A 50-50 chance of winning is also a 50-50 chance of losing. If the state were allowed under Section 5 to adopt a plan providing minority voters with only a 50-50 chance of electing candidates of their choice, the number of blacks elected to the legislature would likely be cut in half. The state proposes, moreover, that "the point of equal opportunity is 44.3% BVAP." The adoption of such a standard would allow the state to abolish many, if not most, of the majority black districts in the state.

Given past and continuing patterns of racial bloc voting, blacks have been elected to office in Georgia and throughout the South primarily in majority black districts. Experience has

shown that white candidates are all but prohibitive favorites to win in majority white districts. The state's 50-50 chance of losing standard would cause a significant reduction in the number of black office holders and should be objectionable under the retrogression standard of Section 5 articulated by this Court.

The state's claim that the Department of Justice (DOJ) and the three-judge court applied a "black maximization" standard is completely belied by the record. Although the state's proposed senate plan reduced the black population in 12 of the 13 majority black districts, DOJ contested, and the three-judge court denied preclearance to, only three of the districts. The absence of "black maximization" is further evident from the fact that the state's house plan was precleared, even though it reduced the black population in a number of districts compared to the benchmark plan. Similarly, DOJ did not contest, and the three-judge court precleared, the state's remedial plan despite the fact that the black population was still lower, by an average of 4.51%, in all three senate district compared to the benchmark plan. If there is a "ratcheting" process at work in the court's opinion, as the state contends, it is one that "ratchets" black majorities down.

The state failed to carry its burden of proof that the reductions in black population in the three senate districts would not a cause a "worsening" of the electoral opportunities of minority voters. The expert testimony presented by the state was deeply flawed and, as found by the three-judge court, "was woefully inadequate" to support a contrary holding.

The three-judge court correctly found that the state failed to present "any" evidence that a decrease in black voting power in the three senate districts at issue would be offset by gains in other districts. The black population was dispersed, not to enhance minority "influence," but to enhance the electoral opportunities of Democrats, particularly white Democrats.

The fact that some black members of the legislature voted for the state's plan is irrelevant to the issue of retrogression. Section 5 was enacted to protect minority voters

from a "worsening" of their voting strength, and not to protect incumbents or promote the electoral fortunes of any particular political party.

This Court has rejected the application of Section 2 "results" analysis to Section 5 preclearance. The adoption of the state's "equal opportunity" approach would require each submitting jurisdiction to show that its proposed change in voting did not have discriminatory results, and would burden the Section 5 preclearance process.

Georgia's statewide redistricting plans have been a constant subject of Section 5 objections and litigation. At the local level, from 1974-1990 some 57 counties and 40 cities in the state were sued over their use of discriminatory at-large elections, and in nearly every case some form of district elections was the result. This entire history of discrimination should be taken into account in determining the retrogressive effect of the state's senate plan.

Congress has provided a dual mechanism, including a private right of action, for enforcing the provisions of the Voting Rights Act. In recognition of that fact, the courts have routinely allowed intervention in Section 5 preclearance actions. Private intervenors can bring an informed, local perspective on current and historical facts at issue. Experience has shown that DOJ and private litigants have often disagreed over the standards to be applied under the Voting Rights Act. Public policy of enforcing the act and ensuring minority access to the political process support a right of private intervention in Section 5 proceedings.

ARGUMENT

I. The State's "Equal Opportunity" Standard Would Have a Devastating Impact on Minority Voting Rights

The state of Georgia proposes that a new "equal opportunity" to elect standard, which it defines as "a 50-50 chance of electing a candidate of choice," *Georgia v. Ashcroft*, 195 F.Supp.2d 25, 66 (D.D.C. 2002), should be adopted to replace the well established "retrogression," or "diminished"

opportunity, standard consistently applied by this Court in determining preclearance of proposed changes in voting under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. *See, e.g., Beer v. United States*, 425 U.S. 130, 141 (1976) (a reapportionment plan may not "lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise"); *Bush v. Vera*, 517 U.S. 952, 983 (1996) (the electoral opportunities of minorities may "not be diminished, directly or indirectly, by the State's actions"); *Reno v. Bossier Parish School Bd.*, 528 U.S. 320, 335 (2000) (a proposed voting change may be "no more dilutive" that the preexisting practice). The state's proposed new "equal opportunity" standard, if adopted, would be plainly retrogressive and have a devastating impact upon minority voting strength.

A 50-50 chance to win is also a 50-50 chance to lose. If the state were allowed under Section 5 to adopt a plan providing minority voters with only a 50-50 chance of electing candidates of their choice in the existing majority black districts, the number of blacks elected to the Georgia legislature would likely be cut in half. Section 5, whose basic purpose is to maintain the status quo and prevent covered jurisdictions from enacting new voting practices that diminish minority voting rights, *South Carolina v. Katzenbach*, 383 U.S. 301, 334-35 (1966), cannot be construed to countenance such a retrograde result.

The 50-50 chance standard promoted by the state is actually far more retrograde even than it appears in the factual context of this case, for if it were adopted it would permit the state to abolish *all* of the majority black districts in the state. The state, and its expert, Professor David Epstein, contend that "the point of equal opportunity is 44.3% BVAP, which means that 'there's a 50-50 chance of electing a candidate of choice' in a district with an open seat and with 44.3% BVAP." *Georgia v. Ashcroft*, 195 F.Supp.2d at 66. *See also* Brief of Appellant, p. 16 (blacks have "an equal chance of winning an open-seat

election where the BVAP was 44%").[2] The adoption of the state's equal opportunity standard would permit the abolition of many, if not most, of the majority black districts in the state, would eviscerate the concept of retrogression under Section 5 in redistricting, and, for the reasons set out more fully below, would roll back the gains in minority office holding since passage of the Voting Rights Act. It would also allow the state to do precisely what Section 5 was designed to circumvent, to stay "one step ahead of the federal courts" by adopting new discriminatory voting procedures. *Beer v. United States*, 425 U.S. at 140.

A. Majority Minority Districts Have Been Key to Minority Electoral Success

On the eve of passage of the Voting Rights Act, there were fewer than a hundred black elected officials in the entire eleven states of the old Confederacy. U.S. Commission on Civil Rights, *Political Participation* 15 (Washington, D.C.: U.S. Government Printing Office, 1968). By January 1993, the number had grown to 4,924. Joint Center for Political and Economic Studies, *Black Elected Officials: A National Roster* xxiii (Lanham, MD: University Press of America, 1993). The key to the increase in effective minority political participation and black officeholding has been the creation of majority-minority districts. Indeed, it is only the creation of such districts under the Voting Rights Act that has succeeded in blunting the effects of systematic white bloc voting.

Throughout the 1970s and 1980s, only about 1% of majority white districts in the South elected a black to a state legislature. Blacks who were elected were overwhelmingly from majority black districts. Lisa Handley & Bernard

[2]Prof. Epstein gave similar testimony in *Colleton County Council v. McConnell*, 201 F.Supp.2d 618, 643 (D.S.C. 2002), a case involving court ordered redistricting in South Carolina. In rejecting Prof. Epstein's analysis that a black VAP as low as 45.58% was the "point of equal opportunity," the three-judge court concluded that "a majority-minority or very near majority-minority voting age population in each district remains a minimum requirement" in order the satisfy the requirements of the Voting Rights Act. *Id.*

Grofman, "The Impact of the Voting Rights Act on Minority Representation: Black Officeholding in Southern State Legislatures and Congressional Delegations," in *Quiet Revolution in the South* 336-37, edited by C. Davidson & B. Grofman (Princeton: Princeton University Press, 1994). As late as 1988, no black had been elected from a majority white district in Alabama, Arkansas, Louisiana, Mississippi, or South Carolina. *Id.* at 346. The number of blacks elected to state legislatures increased after the 1990 redistricting, but again the gain resulted from an increase in the number of majority black districts. David A. Bositis, *Redistricting and Representation: The Creation of Majority-Minority Districts and the Evolving Party System in the South* 46 (Washington, DC: Joint Center for Political and Economic Studies, 1995). The most comprehensive and systematic study to date of the impact of the Voting Rights Act from 1965 to 1990, *Quiet Revolution in the South*, concluded that "the increase in the number of black elected officials is a product of the increase in the number of majority-black districts and not of blacks winning in majority-white districts." Handley and Grofman, "The Impact of the Voting Rights Act on Minority Representation," 335.

The pattern of blacks winning almost exclusively from majority black legislative districts is particularly evident in Georgia. Of the six black state senators and twenty-two representatives elected in 1974, only one—Michael Thurmond, whose district included the university town of Athens—was elected from a majority white (57%) district. The remaining black members were elected from districts that ranged from 56% to 99% black. Laughlin McDonald, Michael Binford & Ken Johnson, "Georgia," in *Quiet Revolution in the South* 87. The plan adopted in Georgia in 1982 increased the number of majority black senate districts from two to eight, and the number of majority black house districts from twenty-four to thirty, setting the stage for increased black representation in both houses of the general assembly. Ga. Laws 1982, pp. 444, 452; Georgia Legislative Information Services, Georgia State Senate Districts as Reflected in SB 388, statistical sheet, Updated April 1984, and Georgia State House Districts, Updated March 1986.

Under the 1992 legislative plan, as in the past, black

electoral success in Georgia was confined almost exclusively to the majority black districts. Of the forty blacks elected to the house and senate under the 1992 plan, all but one was elected from a majority black district. The lone exception was Keith Heard from House District 89 (42% black) in Clarke County, the home of the University of Georgia. Whites, on the other hand, not only won all but one of the majority white districts, but also won fourteen (26%) of the majority black districts. *Members of the Georgia General Assembly, Senate and House of Representatives, Second Session of 1993-94 Term (1994); Johnson v. Miller*, Civ. No. 194-008 (S.D.Ga.), trial transcript, Vol. 4, p. 237, Stipulations Nos. 61-63, Joint Ex. 11. Not surprisingly, the three-judge court in *Johnson v. Miller*, 922 F. Supp. 1552, 1568, 1570-1571 (S.D. Ga. 1995), concluded that because of racial bloc voting, a district maintaining the percentage of black registered voters as close to 55% as possible was necessary to avoid dilution of minority voting strength in the state's Fifth Congressional District.

The same pattern of polarized voting has continued under the 2002 plan. Of the ten blacks elected to the state senate, all were elected from majority black districts (54% to 66% black population). Of the thirty-seven blacks elected to the state house, thirty-four were elected from majority black districts. Of the three who were elected from majority white districts, two (Keith Heard and Carl Von Epps) were incumbents. The third black, Alisha Thomas, was elected from a three-seat district (HD 33). *2003 House of Representatives, Lost & Found Directory*.

The pattern of minority office holding principally from majority black districts exists at the city and county levels in Georgia as well. Based upon a survey conducted in 1989-90 of cities and counties in Georgia, *Quiet Revolution in the South* concluded that:

> The increase in black officeholding can in large measure be traced directly to the gradual demise of at-large elections and the implementation of single-member districts containing effective black voting majorities. These changes were neither self-executing nor voluntary, but were coerced through a combination of congressional legislation, favorable judicial decisions, the enforcement of the preclearance requirement, favorable judicial decisions, and litigation efforts of the civil rights and minority communities.

McDonald, Binford & Johnson, "Georgia," 90.

The most notable exception to the pattern of blacks losing in majority white districts, and upon which the state places special reliance, Brief of Appellant, p. 13, have been judicial elections. Judicial elections, however, are unique in that they are subject to considerable control by the bar and the political leadership of the state. Candidates are essentially preselected through appointment by the governor to vacant positions upon the recommendation of a judicial nominating committee dominated by the bar. The chosen candidate then runs in the ensuing election with all the advantages of incumbency. Judicial elections are low key, low interest contests in which voters tend to defer to the choices that have previously been made. Robert Benham, elected to the court of appeals in 1984 and the state supreme court in 1990, and Clarence Cooper, elected to the court of appeals in 1990, were preselected in this manner. McDonald, Binford & Johnson, "Georgia," 85. The ability of preselected blacks to win low key judicial elections does not, however, translate into the ability of blacks to elect candidates of their choices in majority white state house and senate districts.

Given the continuing levels of white block voting identified by the three-judge court in this case, 195 F.Supp.2d at 69, white candidates are all but prohibitive favorites to win in majority white legislative districts in Georgia, not to mention the rest of the South. To provide black voters an opportunity to elect candidates of their choice only in selected districts, and with reduced black populations that provide a 50-50 chance of losing, would cause a significant reduction in the number of black office holders and should be objectionable under the retrogression standard articulated by this Court.

II. The State's "Maximization" Charge Is Belied by the Record

The state's claim that the Department of Justice (DOJ) has a policy of insisting on "high concentration," "super majority" black districts, Brief of Appellant, p. 30, is completely belied by the record in this case. As appears from the table below, the plan proposed by the state for the senate contained 13 districts with a majority black population and/or voting age population (VAP).[3] Despite the fact that there was an absolute retrogression in black voting strength in 12 of the districts compared to the preexisting benchmark plan, DOJ argued that only three districts violated Section 5, *i.e.*, SDs 2, 12, and 26. *Georgia v. Ashcroft*, 195 F. Supp. 2d at 37.

MAJORITY BLACK DISTRICTS IN BENCHMARK AND PROPOSED SENATE PLAN

BLACK DISTRICTS	EXISTING PLAN	PROPOSED PLAN
*2 (Savannah)	64.76%	54.99%
	60.58%BVAP	50.31%BVAP
10 (Ellenwood)	73.5%	64.87%
	70.66%BVAP	64.14%BVAP
*12 (Albany)	59.31%	53.51%
	55.43%BVAP	50.66%BVAP
15 (Columbus)	64.32%	53.74%
	62.05%BVAP	50.87%BVAP
22 (Augusta)	66.84%	54.71%
	63.51%BVAP	51.51%BVAP
*26 (Macon)	66.62%	54.88%
	62.45%BVAP	50.8%BVAP
**34 (Morrow)	36.4%	52.94%
	33.96%BVAP	50.54%BVAP
35 (Atlanta)	77.68%	62.71%
	76.02%BVAP	60.69%BVAP
36 (Atlanta)	65.3%	61.9%
	60.36%BVAP	56.94%BVAP
38 (Atlanta)	78.06%	63.59%
	76.61%BVAP	60.29%BVAP
39 (Atlanta)	58.65%	60.01%
	54.73%BVAP	56.54%BVAP
43 (Decatur)	89.63%	64.88%
	88.91%BVAP	62.63%BVAP
44 (Jonesboro)	52.8%	38.23%
	49.62%	34.71%
55 (Clarkston)	73.73%	61.85%
	72.4%BVAP	60.64%BVAP

* Districts challenged by DOJ and denied preclearance.
** New district created in proposed plan.

[3]The United States, based upon its census calculations, concluded that only 11 proposed districts contained majority black VAPs. The state contends that the number is 13. *Georgia v. Ashcroft*, 195 F.Supp.2d 56. Without attempting to resolve this dispute, the figures set out in the table are those of the state, since no matter which figures are used the proposed plan reduced the black population in 12 districts.

That DOJ did not apply a black "maximization" standard, as the state insists, Brief of Appellant, p. 39, is further evident from the fact that DOJ did not pose an objection to the state's house plan, despite the fact that it reduced the black population in a number of house districts compared to the benchmark plan. *Georgia v. Ashcroft*, 195 F.Supp.2d at 95.

DOJ did not in any event deny preclearance to the state's senate plan. That was done by the three-judge court in a carefully reasoned, narrowly tailored opinion applying the standards for retrogression under Section 5 consistently articulated by this Court. *See Georgia v. Ashcroft*, 195 F.Supp.2d at 31, 74 (applying the "diminished" opportunity standard of *Beer v. United States*, 425 U.S. at 141, and the "no more dilutive" standard of *Reno v. Bossier Parish School Bd.*, 528 U.S. at 335). In preclearing the house plan, the court held that:

> While some of the existing House districts would experience decreases in BVAP under the proposed plan, there is no evidence before the court of racially polarized voting in any House Districts that might suggest that these decreases will have a retrogressive effect.

Id. at 95. No amount of distortion by the state can transform this straightforward application of the retrogression standard of

Section 5 into a mandate for "supermajority" black districts. That the court did not apply such a mandate is further evident from its explicit acknowledgment that:

> the Voting Rights Act allows states to adopt plans that move minorities out of districts in which they formerly constituted a majority of the voting population, provided that racial divisions have healed to the point that numerical reductions will not necessarily translate into reductions in electoral power.

Id. at 78.

In 12 of the proposed senate districts, the reduction in black VAP ranged from -3.42% to -26.28%. In nine of the districts the reduction in black VAP was greater than 10%. *Georgia v. Ashcroft*, 195 F.Supp.2d at 82. Preclearance was denied, however, to only three districts. Clearly, there is no merit whatever to the state's overheated charge that the "district court's ruling imposes a one-way march towards maximization . . . . [and] dictates an inexorable 'ratcheting up' process, with Georgia losing its authority to make reasonable redistricting choices along the way." Brief of Appellant, p. 39. If there is a "ratcheting" process at work in the court's opinion, it is one that "ratchets" black majorities down.

Yet further evidence that the mere reduction in black population was not viewed as a basis for a Section 5 objection is apparent from the fact that DOJ did not object to, and the three-judge court approved, the 2002 remedial plan proposed by the state (Georgia Act No. 444). *Georgia v. Ashcroft*, 204 F.Supp.2d 4, 9, 16 (D.D.C. 2002). While the black population was increased compared to the objected to plan, it was still lower, by an average of -4.51%, in all three districts compared to the benchmark plan. *Id.* at 7. Moreover, one of the three senate seats (District 12) was held by a white incumbent, Senator Michael Meyer von Bremen. He was reelected under the 2002 remedial plan, an event that disproves the state's claim that DOJ and the court applied a standard that "mandate[s] the creation of safe seats with guaranteed political outcomes."

Brief of Appellant, p. 38.[4]

The lower court properly considered the factors that inform a Section 5 retrogression analysis, including the extent and degree of racially polarized voting. Thus, reductions in minority population that might be tolerable in one area, even though relatively small, might have a retrogressive effect in another. The area specific analysis applied by the three-judge court is entirely consistent with the purposes of Section 5 and its interpretation by this Court.

The state also errs in claiming that a "residue" or "legacy" of maximization remains from the 1990s redistricting described in *Miller v. Johnson*, 515 U.S. 900 (1995). Brief of Appellant, pp. 9-10. The legislative plan adopted in 1997 was the result of court-ordered mediation, *Johnson v. Miller*, No. 196-040 (S.D.Ga.), and was precleared by DOJ. There is no factual or legal basis for contending that the plan has a "residue" of discrimination. This Court has repeatedly held that the last legally enforceable plan used by a jurisdiction is to serve as the baseline for comparison in a Section 5 retrogression analysis. *Abrams v. Johnson*, 521 U.S. 74, 96-7 (1997); *Holder v. Hall*, 512 U.S. 874, 883-84 (1994). Accordingly, as long as the preexisting plan has not been declared unconstitutional as a "residue" of discrimination, it must serve as the benchmark under Section 5. Furthermore, the preexisting plan was admittedly unconstitutional under one person, one vote. An inquiry into whether the plan is also the "legacy" of a *Miller* type violation would therefore embroil a court in an extensive trial over the moot issue of whether the plan is unconstitutional for other reasons as well.

III. The State Failed to Carry Its Burden of Proof

The three-judge court denied preclearance to Georgia's senate plan for the unexceptional reason that "the state has not met its burden of proof" of showing that the reduction in black population in SDs 2, 12, and 26 "does not have the effect of

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[4]Whites were also elected in two other majority black senate districts, SDs 22 and 36.

worsening minority voters' opportunities to effectively exercise their voting rights." *Georgia v. Ashcroft*, 195 F. Supp. at 93. The expert testimony the state presented "was woefully inadequate" and did not support a contrary holding. *Id.*

Among the defects in the "equal opportunity" analysis performed by the state's expert, Prof. Epstein, were (a) his erroneous reliance solely on statewide, as opposed to region or district specific, data,[5] (b) his failure to acknowledge the range of statistical variation in his estimate of the black percent needed to provide an equal opportunity to elect,[6] (c) his use of analyses that were marred by errors in "coding" that affected his conclusion,[7] and (d) his use of a method of analysis (probit analysis) that failed to account for variations in levels of racial polarization.[8] The court concluded that Epstein's analysis was "all but irrelevant." *Georgia v. Ashcroft*, 195 F.Supp.2d at 81.

Prof. Epstein also failed to take into account the "chilling" effect upon black political participation, and the "warming" effect upon white political participation, caused by the transformation of a majority black district into a majority white district. Once a district is perceived as no longer being

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[5]Prof. Epstein calculated one "equal opportunity number" and insisted that "there was no need to perform regional analysis." 195 F.Supp.2d at 65. But as the three-judge court held, "despite the importance of such information to the Section 5 inquiry, plaintiff has provided the court with no competent, comprehensive information regarding white crossover voting or levels of polarization in individual districts." *Id.* at 88.

[6]Despite the fact that the white crossover voting calculated by Prof. Epstein ranged from 24.73% to 57.39%, he did not consider this range to be "statistically significant." 195 F.Supp.2d at 66.

[7] Prof. Epstein, for example, "coded" incumbent Representative Cynthia McKinney as a non-incumbent running for an open seat, and failed to code white incumbent Senator Meyer von Bremen as an incumbent. 195 F. Supp. 2d at 81.

[8]195 F.Supp.2d at 88. The three-judge court in *Colleton County v. McConnell*, 201 F.Supp.2d at 643, similarly rejected Prof. Epstein's "equal opportunity" probit analysis, which it described as "a new technique . . . which he professes to have pioneered."

majority black, black candidacies and black turnout are diminished, or "chilled," while white candidacies and white turnout are enhanced, or "warmed." *See Colleton County v. McConnell*, Supplemental Report of Prof. James W. Loewen, p. 2 ("[s]ocial scientists call the political impact of believing that one's racial or ethnic group has little hope to elect the candidate of its choice the 'chilling effect'"). A formerly majority black district, particularly one without a black incumbent, would not be expected to "perform" in the same way after being transformed into a majority white district.

The statistical analysis performed by Professor Richard Engstrom, the expert witnesses for DOJ, in contrast to that presented by Prof. Epstein, "clearly described racially polarized voting patterns in Senate Districts 2, 12 and 26." *Georgia v. Ashcroft*, 195 F.Supp.2d at 69. The court further found that the levels of polarized voting in the redrawn districts would be "high,"and that the state "has presented no evidence to suggest otherwise." *Id.* at 86.

Aside from the statistical analysis presented by Prof. Engstrom, including the evidence of racially polarized voting, and the degree of white crossover voting, the three-judge court relied upon the lay testimony proffered by the parties of the effect of the proposed plans on the ability of minority voters to exercise their electoral franchise. *Georgia v. Ashcroft*, 195 F.Supp.2d at 80, 88-91. After "a searching review of the record," the court properly concluded that "the State has not met its burden of proof." *Id.* at 93. There is no basis for conflating, as the state attempts to do, the court's careful, reasoned opinion with "ratcheting" or a standard of black maximization. The state simply failed to carry its burden of proof that proposed SDs 2, 12, and 26 were not retrogressive.

IV. The Red Herring Of Minority Influence

The state argues that "the supermajority districts demanded" by the three-judge court "necessarily diminish African American voter influence in other districts." Brief of Appellants, p. 36. The court did not, of course, demand the creation of supermajority districts but instead approved the construction of districts that significantly reduced the

preexisting black VAP. More important, aside from raising a theoretical objection, the court held that the state "has failed to present any such evidence" that the decrease in black voting power in SDs 2, 12, and 26 would be offset by gains in other districts. 195 F.Supp.2d at 88. The state's minority influence theory fails as a matter of proof.

In addition, the Section 2 standard which the state argues (erroneously) should be applicable in this case by its express language protects the equal right of minorities "to elect" candidates of their choice, 42 U.S.C. § 1973(b), and not simply the right to influence the outcome of elections. In light of the plain language of the statute, this Court has consistently held that Section 2 guarantees the right "of a protected class to elect its candidates of choice on an equal basis with other voters." *Voinovich v. Quilter*, 507 U.S. 146, 153 (1993). *See also Thornburg v. Gingles*, 478 U.S. 30, 88 (1986) ("minority voting strength is to be assessed solely in terms of the minority group's ability to elect candidates it prefers") (O'Connor J., concurring). Thus, the very standard which the state argues should be applied to this case refutes its claim that influence is a substitute for the ability of minorities to elect candidates of their choice.

Minority influence theory, moreover, is frequently nothing more than a guise for diluting minority voting strength. Members of the Georgia legislature, for example, opposed the creation of a majority black congressional district in 1981 on the grounds that black political influence would be diminished by "resegregation," "white flight," and the disruption of the "harmonious working relationship between the races." *Busbee v. Smith*, 549 F. Supp. 494, 507 (D.D.C. 1982), *aff'd*, 459 U.S. 1166 (1983). The three-judge court, in denying Section 5 preclearance of the state's congressional plan, found that these reasons were pretextual and that the legislature's insistence on fragmenting or disbursing the minority population in the Atlanta metropolitan area was "the product of purposeful racial discrimination." *Id.* at 517.

Here, the state seeks once again to disperse the black population, this time in the Albany, Macon, and Savannah areas. The pretext for doing so, according to the state's

argument in this Court, was to enhance minority "influence." Brief of Appellant, p. 36. But it is unrefuted in the record that the real reason for fragmenting the black vote was to enhance the opportunities of Democrats, particularly white Democrats. 195 F.Supp.2d at 91-2. Senator Robert Brown, the black incumbent from SD 26, for example, consented to the reduction in black population in his district "in order to assist neighboring white Democratic incumbents." *Id.* at 92.

Linda Meggers, the state's chief demographer, testified that the redistricting process was driven by partisanship. To enable it to draw Democrat-friendly districts, the Democratic controlled legislature developed sophisticated "political performance data" that allowed it to determine how a proposed district might vote in future elections based upon its performance in prior elections. 195 F.Supp.2d at 41. The goals of the Democrats were to protect incumbents and "increase the number of Democratic seats" by reducing, or not "wasting," the black votes in existing majority black districts. *Id.* The intensely partisan nature of the redistricting is further evident from the fact that not a single Republican in either the house or senate voted in favor of the enacted plans. 195 F.Supp.2d at 41.

Partisan rancor is also evident from the fact that Governor Sonny Perdue, a Republican, is now openly feuding with Attorney General Thurbert Baker, a Democrat, over whether to withdraw the instant appeal pending in this Court. In a lawsuit recently filed in state court, the governor has sued the attorney general arguing that the governor has the authority to withdraw the appeal and demanding that the appeal be dismissed. According to the governor, "further prosecution of the pending appeal is *not* in the best interest of the people of the State of Georgia and . . . the pending appeal should be dismissed." *State of Georgia v. Thurbert E. Baker*, No. 2003 CV 66239 (Sup. Ct. Fulton Cty., Ga. Feb 28, 2002), Verified Complaint, p. 19. If the governor prevails in his law suit, this appeal would presumably be dismissed. But in any case, the partisan nature of the redistricting refutes the state's claim that its goal was merely to increase minority influence.

A. Black Legislative Support Cannot Excuse Retrogression

The state's demographer, Ms. Meggers, said that most of the black senators went along with the Democrats' plan because if the Democrats failed to control the house and senate, "all existing African American chairs of committees would be lost." 195 F.Supp.2d at 42. Black legislative support of the Democrats' plans was not unanimous, however. Two black caucus members voted against the house and senate plans, Senator Regina Thomas and Representative Dorothy Pelote, both of whom were from the Savannah area. *Id.* at 41, 55.

The three-judge court concluded that the support of the state's plan by black incumbents could not justify a retrogression in minority voting strength. As the court held:

> A vote for legislation is almost always a compromise of some sort, motivated by a complex intersection of self-interest and external pressure. A court that tries to unpack these forces, and assign probative weight to them, treads a treacherous path. Accordingly, we are loath to rely on testimony regarding the nature of legislative trade-offs, or on post-hoc expressions of doubt on the part of legislators who nevertheless voted for the contested plan. Certainly, as it relates to the plan's possible retrogressive effect, this is dubious evidence indeed.

195 F.Supp.2d at 89. *See also, id.* at 101 ("that Georgia's African American politicians sought to make their state safer for Democratic candidates does not establish (or even imply) that in so doing they did not make it worse for African American voters") (Edwards, Circuit Judge, concurring)).

Section 5 of the Voting Rights Act was enacted, as the court correctly concluded, to protect minority voters from a retrogression of their voting strength, and not to protect incumbents or "to safeguard the electoral fortunes of any particular political party." 195 F.Supp.2d at 93. In addition,

for a court to grant preclearance to a voting change for the reason that it protected particular incumbents or advanced the interests of a particular political party, would violate the court's obligation to act "circumspectly, and in a manner 'free from any taint of arbitrariness or discrimination.'" *Connor v. Finch*, 431 U.S. 407, 415 (1977) (*quoting Roman v. Sincock*, 377 U.S. 695, 710 (1964)). While a court may acknowledge or follow traditional state districting principles, it does not possess the power to reconcile conflicting state policies on the electorate's behalf or advance a particular political agenda. *Id.* The support of black legislators for a partisan plan that diminishes black voting strength cannot shield the plan from an objection under Section 5.

V. The State's Section 2 Approach Has Been Rejected by this Court

In *Reno v. Bossier Parish School Bd.*, 520 U.S. 471 (1997), the Court specifically rejected the contention made by the state here, that Section 2 results analysis should be imported into Section 5. Brief of Appellant, p. 34 (arguing that "Section 5 cannot . . . be applied to require results . . . beyond what § 2 permits"). The Court noted that Sections 2 and 5 "impose very different duties upon the States," and to apply Section 2 results analysis to Section 5 "would contradict our longstanding interpretation of these two sections of the Act." 520 U.S. at 477. The Court further held that "the burden on judicial resources might actually increase if appellants' position prevailed because § 2 litigation would effectively be incorporated into *every* § 5 proceeding." *Id.* at 485.

Between 15,000 to 24,000 administrative Section 5 submissions are made each year, not counting declaratory judgment actions filed in federal court. U.S. Department of Justice, Civil Rights Division, *Voting Section, Section 5 Changes by Type and Year, 1965-2002*. Were each of the submissions required to be analyzed under a full Section 2 equal opportunity, or discriminatory results, analysis the work of the Department of Justice and the courts would be significantly increased.

Under the state's Section 2 approach, each submitting

jurisdiction would presumably be required to prove that its proposed change, no matter how seemingly minor or routine, did not result in discrimination by showing the absence of the various factors identified in *Thornburg v. Gingles*, 478 U.S. 30, 44-5 (1986), as probative of minority vote dilution, *e.g.*, racial campaign appeals, the extent of minority office holding, the existence of racial bloc voting, depressed socio-economic, status, etc. Each submission would presumably have to be resolved under the "totality of circumstances" approach required in Section 2 cases. *Johnson v. De Grandy*, 512 US. 997 (1994). Abandoning the retrogression standard of Section 5, which in the vast majority of submissions involves a relatively simple comparison of a proposal with a benchmark, in favor of the state's Section 2 "totality of circumstances" approach, would burden the Section 5 process. As in *Reno v. Bossier Parish School Bd.*, the state's Section 2 approach should be rejected here.

VI. The State's View of Georgia's Reapportionment History Is Selective and Truncated

The state acknowledges in its brief the importance of "Georgia's reapportionment history" in resolving the issues presented in this case, Brief of Appellant, p. 7, but in its constricted view that history did not begin until 1991. According to the state, "Georgia's current legislative redistricting can only be understood by looking at the preceding redistricting of 1991-92." *Id.* To the contrary, legislative redistricting and the operation of Section 5 can only be understood by looking at the entire history of discrimination, backsliding, and racially polarized voting that have characterized the political process in Georgia. *See City of Petersburg v. United States*, 354 F. Supp. 1021 (D.D.C. 1972), *aff'd*, 410 U.S. 962 (1973) (denying preclearance and reciting the history of racial segregation, bloc voting, and discrimination); *Busbee v. Smith*, 549 F. Supp. at 517(same).

The history of discrimination in voting in Georgia was succinctly summarized by Justice Ginsburg in her dissenting opinion in *Miller v. Johnson*, 515 U.S. 900, 936-38 (1995), and need not be repeated here. Amicus would simply add that the amount of litigation required to enforce minority voting rights

in Georgia has, by any estimate, been extraordinary.

The state's statewide redistricting plans have been a constant subject of Section 5 objections and litigation. The Attorney General objected to the state's 1972 house redistricting plan because it contained a variety of practices that had the clear potential for diluting black voting strength. *Georgia v. United States*, 411 U.S. 526, 530 (1973). The Attorney General objected to the state's senate plan because of the potentially discriminatory way in which districts had been drawn in Fulton and Richmond Counties. *United States v. Georgia*, 351 F. Supp. 444, 445 (N.D.Ga. 1972). The state's congressional plan was denied preclearance because it fragmented the black population in the Atlanta area and excluded from the fifth district the residences of blacks who were known to be potential candidates (Andrew Young and Maynard Jackson). *Bacote v. Carter*, 343 F. Supp. 330, 331 (N.D.Ga. 1972); *Busbee v. Smith*, 549 F. Supp. at 500.

The court denied preclearance to Georgia's 1980 congressional plan after finding evidence "of racially discriminatory intent," and made the express finding that the chair of the house reapportionment committee "is a racist." *Busbee v. Smith*, 549 F. Supp. at 500, 517. The Attorney General also objected to the state's house and senate plans because they fragmented concentrations of black population in several areas of the state—DeKalb, Richmond, and Dougherty Counties. William Bradford Reynolds to Michael Bowers, Feb. 11, 1982.

At the local level, from 1974-1990 some 57 counties and 40 cities in Georgia were sued over their use of at-large elections, and in nearly every case some form of district elections was the result. McDonald, Binford & Johnson, "Georgia," p. 79. Most of the cases were settled, but in those that went to trial the courts made extensive findings of the factors showing minority vote dilution and the need for creating effective majority-minority districts.

In *Paige v. Gray*, 437 F. Supp. 137, 153-58 (M.D.Ga. 1977), for example, a successful challenge to at-large elections in Albany, the court found that: the city functioned "in every

respect . . . as a racially segregated community;" schools, voting, the library, the city auditorium, tennis courts, swimming pools, public housing, juries, municipal employment, taxicabs, theaters, and city busses were segregated; the Democratic party was "in the hands of an all-white committee;" the black community "has just never had the opportunity or been permitted to enter into the political process of electing city commissioners;" the at-large system was "winner take all" and was unconstitutional. The other counties and cities in Georgia shared a common history of discrimination. For a fuller discussion of this history and voting rights litigation in Georgia, *see* Laughlin McDonald, *A Voting Rights Odyssey; Black Enfranchisement in Georgia* (Cambridge: Cambridge U. Press, 2003).

The *entire* history of discrimination in Georgia, and not just the 1990s redistricting, needs to be taken into account in determining the retrogressive effect of the state's senate plan.

VII. Private Parties Should Be Allowed to Intervene in Section 5 Preclearance Actions

The state's claim that "[n]ot a word in the Voting Rights Act hints that private citizens possess a right to intervene and arrogate to themselves the enormous responsibilities and power of the Attorney General," Brief of Appellants, p. 41, reflects an ignorance of the dual enforcement mechanism of the act established by Congress. In *Allen v. State Board of Elections*, 393 U.S. 544, 554-55 (1969), the Court acknowledged a private cause of action to enforce the very provision of the act at issue here, Section 5. Speaking of the original 1965 act, the Court noted that "[t]he Voting rights Act does not explicitly grant or deny private parties authorization to seek a declaratory judgment that a State has failed to comply with the provisions of the Act." Despite that, the Court held that such a cause of action was "implied" because the act was "passed to protect a class of citizens." *Id.* at 557. The Court concluded that "[t]he achievement of the Act's laudable goal could be severely hampered . . . if each citizen were required to depend solely on litigation instituted at the discretion of the Attorney General." Id. at 556. The Court found in addition that because the "Attorney General has a limited staff . . . . [i]t is consistent with

the broad purpose of the Act to allow individual citizens standing to insure that his city or county government complies with the § 5 approval requirements." *Id.* at 556-57.

Following the decision in *Allen*, Congress amended and extended the Voting Rights in 1970, 1975, and 1982 and made it clear that a private cause of action to enforce the act was not simply implied but is expressly sanctioned. The House report that accompanied the 1970 extension cited *Allen* with approval, noted "the need for private policing," and concluded that "private persons have authority to challenge the enforcement of changed voting practices and procedures." H.R. Rep. No. 397, 91st Cong., 2d Sess. 8 (1970), reprinted in 1970 U.S. Code Cong. & Adm. News 3277, 3284.

When it amended and extended the Voting Rights Act in 1975, Congress once again expressly provided for private enforcement. Section 3 of the act as originally enacted in 1965 provided for the appointment of federal examiners and other special procedures in actions brought "under any statute to enforce the guarantees of the fifteenth amendment" by the Attorney General. *See* 79 Stat. 437. The 1975 amendments authorized the bringing of such enforcement actions by "the Attorney General *or an aggrieved person*." 42 U.S.C. § 1973a (emphasis added). Congress made it clear that the purpose of the amendment was to provide dual enforcement of the act by both the Attorney General and private parties. According to the Senate report:

> In enacting remedial legislation, Congress has regularly established a dual enforcement mechanism. It has, on the one hand, given enforcement responsibility to a governmental agency, and on the other, has also provided remedies to private persons acting as a class or on their own behalf. The Committee concludes that it is sound policy to authorize private remedies to assist the process of enforcing voting rights.

S.Rep. No. 94-295, 94th Cong., 1st Sess. 40 (1975), reprinted in 1975 U.S. Code Cong. & Adm. News 807.

The legislative history of the 1975 amendments is filled with references to the importance of private enforcement and the need to afford private parties the same remedies the act affords to the Attorney General. *See, e.g.*, 121 Cong. Rec. 16268 (statement of Rep. Drinan) (noting the necessity to "provide a dual enforcement mechanism in the voting field"); *id.* at 16915 (statement of Rep. Rangel) (stressing the importance of private enforcement of the act). When President Ford signed the 1975 amendments into law, he highlighted the importance of private rights of action:

> [T]his bill will permit private citizens, as well as the Attorney General, to initiate suits to protect the voting rights of citizens in any State where discrimination occurs. There must be no question whatsoever about the rights of each eligible American, each eligible citizen to participate in our elective process. The extension of this act will help ensure that right.

President's Remarks Upon Signing the Voting Rights Act Extension Into Law, 11 Weekly Comp. Pres. Doc. 837 (Aug. 6, 1975).

Congress amended and extended the act again in 1982 to provide, among other things, a discriminatory "results" standard for suits under Section 2. *See Thornburg v. Gingles*, 478 U.S. at 35. In doing so, the Senate report that accompanied the 1982 amendments, citing *Allen* with approval, "reiterates the existence of the private right of action under Section 2, as has been clearly intended by Congress since 1965." S.Rep. No. 417, 97th Cong., 2d Sess. 30 (1982), reprinted in 1982 U.S. Code Cong. & Adm. News 208(1982). The House report is to the same effect. It provides that "citizens have a private cause of action to enforce their rights under Section 2." H.R.Rep. No. 97-227, 97th Cong., 1st Sess. 32 (1981).

In *Morse v. Republican Party of Virginia*, 517 U.S. 186, 239 n. 40 (1996), this Court acknowledged a private right of action to enforce § 10 of the act, 42 U.S.C. § 1973h, which authorizes "the Attorney General" to institute action in the name of the United States to enjoin enforcement of any

requirement of the payment of a poll tax as a precondition for voting. The Court discussed in detail the legislative history of various amendments of the act and concluded that their "purpose . . . was to provide *the same* remedies to private parties as had formerly been available to the Attorney General alone." 517 U.S. at 233 (emphasis added).

Thus, whenever private enforcement has been an issue, whether in enforcing Section 2, Section 3, Section 5, or Section 10, the right of a private cause of action, and private participation, has been recognized. The state's complaint that it "should not be subjected to the political strategems of intervenors wearing the mantle of private attorneys general," Appellant's Brief, p. 42, is unavailing. Congress intentionally established a dual enforcement mechanism for Section 5 to provide minorities an opportunity to participate in the preclearance process.

A. Intervention Should Be Encouraged and Is Routinely Granted

Given the broad purpose of the Voting Rights Act to secure equal political participation, and the importance of reliable decisionmaking, intervention should be encouraged in Section 5 preclearance actions. Intervenors, unlike the United States, include residents and voters of a submitting jurisdiction and are therefore in a special position to provide the trial court with a local appraisal of the facts and circumstances involved in the litigation. In *County Council of Sumter County v. United States*, 555 F.Supp. 694, 697 (D.D.C. 1983), for example, the court allowed black citizens to intervene in a voting rights suit in part specifically because of their "local perspective on the current and historical facts at issue." Indeed, it is no doubt because intervention brings a "local perspective" to the litigation that the state in this case seeks so adamantly to exclude it.

Intervention in voting cases is appropriate for the further reason that while the interests of the United States and private parties may often be congruent, they are frequently divergent. In *City of Lockhart v. United States*, 460 U.S. 125, 130 (1983), for example, the minority intervenors presented the

sole argument in the Supreme Court on behalf of the appellees; no argument was presented on behalf of the United States. In *Blanding v. DuBose*, 454 U.S. 393, 398-399 (1982), minority plaintiffs, but not the United States, appealed and prevailed in the Supreme Court in a voting rights case involving the method of electing a county government in South Carolina. And in *County Council of Sumter County*, 555 F.Supp. at 696, the United States and minority intervenors took opposite positions regarding the application of Section 2 to Section 5 preclearance.

Intervention in Section 5 cases is governed by the same standards as in any other case. In *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538 n. 10 (1972), the Court held that when a party to an existing suit is obligated to serve two distinct interests, which, although related, are not identical, another with one of those interests should be entitled to intervene. The test for determining the propriety of intervention is whether each of the dual interests "always dictate precisely the same approach to the conduct of the litigation." *Id.* at 539. The interests of intervenors in litigation such as this are sufficiently different from those of the United States to justify intervention. The United States must represent the interests of its citizenry generally, including the interests of state defendants. Given the divergence of intervenors' interests from those of the United States, and the examples from other voting cases in which the United States has failed to represent--or even opposed--the interests of minority voters, intervention should be liberally allowed.

For this and other reasons, timely intervention in Section 5 preclearance and Section 4(a) bailout actions in the District of Columbia court has been routinely granted. *See, e.g., Busbee v. Smith*, 549 F.Supp. at 518; *City of Lockhart v. United States*, 460 U.S. at 129; *City of Port Arthur, Texas v. United States*, 517 F.Supp. 987, 991 n.2 (D.D.C. 1981), *aff'd*, 459 U.S. 159 (1982); *City of Richmond, Virginia v. United States*, 376 F.Supp. 1344, 1349 n.23 (D.D.C. 1974) *vacated and remanded on other grounds*, 422 U.S. 358 (1975); *Beer v. United States*, 374 F.Supp. 363, 367 n.5 (D.D.C. 1974), *vacated and remanded on other grounds*, 425 U.S. 130 (1976); *Commonwealth of Virginia v. United States*, 386 F.Supp. 1319,

1321 (D.D.C. 1974), *aff'd*, 420 U.S. 901 (1975); *City of Petersburg, Virginia v. United States*, 354 F.Supp. 1021, 1024 (D.D.C. 1972), *aff'd*, 410 U.S. 962 (1973), and *aff'd sub nom. Diamond v. United States*, 412 U.S. 901 (1973); *Commissioners Court of Medina County, Tex. v. United States*, 683 F.2d 435, 438 (D.D.C. 1981); *Bossier Parish School Bd. v. Reno*, 7 F. Supp.2d. 29, 31 (D.D.C. 1995), *aff'd*, 528 U.S. 320 (2000); *State of Texas v. United States*, 802 F. Supp. 481, 486 (D.D.C. 1992); *State of Texas v. United States*, 866 F. Supp. 20, 21 (D.D.C. 1994).

B. The State's Legal Analysis Is Seriously Flawed

The state not only ignores the dual enforcement scheme for enforcing the Voting Rights Act, but it distorts the cases it relies upon beyond recognition. It erroneously claims that *Apache County v. United States*, 256 F. Supp. 903 (D.D.C. 1966), a Section 4(a) bailout action, stands for the proposition that "intervention [is] inappropriate because of the Attorney General's unique statutory role." Brief of Appellant, p. 41. While the court denied intervention based on the particular facts involved, it held that "the court has discretionary authority to permit intervention by applicants offering to provide evidence or argument concerning the facts the court must determine in arriving at its declaratory judgment." *Id.* at 908. The state similarly misstates the holding in *Morris v. Gressette*, 432 U.S. 491 (1977), *i.e.*, that "§ 5 preclearance determinations have no place for participation by third parties." Brief of Appellant, p. 41. The Court made no such statement and held only that there was no judicial review of the Attorney General's failure to object to a proposed voting change. *Id.* at 504-05.

The state's reliance upon *Georgia v. Reno*, 881 F. Supp. 7 (D.D.C. 1995), *aff'd sub nom. Brooks v. Georgia*, 516 U.S. 1021 (1995), is also misplaced. There is not a single word in the trial court's opinion dealing with intervention. This Court's summary affirmance of a decision which makes no mention of intervention can hardly be construed as "agree[ment] with appellant's opposition to intervention." Brief of Appellants, p. 41. Similarly, in *NAACP v. New York*, 413 U.S. 345, 369 (1973), the Court upheld the denial of intervention on the ground that "the motion to intervene was untimely." But there

is no suggestion or hint in the opinion that intervention was inherently inappropriate. Indeed, the Court expressly held that the applicants for intervention "were free to renew their motion to intervene" at a future date. *Id.* at 368. The applicants did in fact renew their motion for intervention and it was granted by the district court, *New York State v. United States*, 65 F.R.D. 10, 12 (D.D.C. 1974), a fact which the state conveniently fails to bring to the attention of the Court.

C. Intervenors Have a Preeminent Interest in Preclearance

The state makes the truly extraordinary claim that minority intervenors have no "interest" in the Section 5 preclearance process. Brief of Appellant, p. 42. To the contrary, as members of the very group for whose protection Section 5 was enacted, no one could have a greater "interest" in preclearance than intervenors.

The state also errs in arguing that no right of intervenors is "impeded" because they can always challenge a precleared voting change under Section 2. Brief of Appellants, pp. 41 n.11, 43. The state fails to note that the ability to challenge a voting practice on retrogression grounds does not exist under Section 2. In addition, the burden of proof is on the submitting jurisdiction under Section 5, but is upon minority plaintiffs in a Section 2 "results" case. Once a voting change is precleared, a presumption of legality attaches and minority rights and interests are by definition impeded.

Diamond v. Charles, 476 U.S. 54 (1986), upon which the state relies for its argument that intervenors have no interest or "claim" is completely inapposite. In *Diamond*, the Court merely held that "a private party whose own conduct is neither implicated nor threatened by a criminal statute has no judicially cognizable interest in the statute's defense." *Id.* at 56. As Justice O'Connor elaborated in her concurrence, the intervenor had no claim or defense because "he asserts no actual, present interest that would permit him to sue or be sued by appellees, or the State of Illinois, or anyone else, in an action sharing common questions of law or fact with those at issue in this litigation." *Id.* at 77. Here, of course, intervenors, as members

of a group protected by the Voting Rights Act, *do* have an interest that would permit them to sue the State of Georgia in an action challenging its senate plan sharing common questions of law or fact with those at issue in this litigation. *Diamond* in fact indicates the propriety of intervention here. The state, although unwittingly, concedes as much by noting that intervenors could challenge a precleared plan in a separate action under Section 2. Intervenors have both an interest and a claim sufficient to support intervention.

CONCLUSION

For the foregoing reasons, amicus respectfully suggests that the judgment of the three-judge court be affirmed.

Respectfully submitted,

LAUGHLIN MCDONALD
Counsel of Record
NEIL BRADLEY
BRYAN SELLS
MEREDITH E. B. BELL
American Civil Liberties
Union Foundation
2725 Harris Tower
233 Peachtree Street
Atlanta, GA 30303
(404) 523-2721

ELAINE R. JONES
Director-Counsel

NORMAN J. CHACHKIN
DEBO P. ADEGBILE
NAACP Legal Defense
and Educational Fund, Inc.
99 Hudson Street, Suite 1600
New York, New York 10013
(212) 219-1900

BARBARA R. ARNWINE
THOMAS J. HENDERSON
ANITA HODGKISS
Lawyers' Committee for
Civil Rights Under Law
1401 New York Ave., N.W.
Suite 400
Washington, DC 20005
(202) 662-8600

TODD A. COX
NAACP Legal Defense
and Educational Fund, Inc
1444 Eye Street, N.W.
10th Floor
Washington, D.C. 20005
(202) 682-1300

Counsel for Amicus Curiae Georgia Coalition For The Peoples' Agenda